Docket for 05-51

(25)

No. 05-51
Title: Mario A. Bustillo, Petitioner
v.
Gene M. Johnson, Director, Virginia Department of Corrections
Docketed: July 7, 2005
Lower Ct: Supreme Court of Virginia
Case Nos.: (042023)
Decision Date: March 7, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 20 2005	Application (04A997) to extend the time to file a petition for a writ of certiorari from June 5, 2005 to August 4, 2005, submitted to The Chief Justice.
May 25 2005	Application (04A997) granted by The Chief Justice extending the time to file until July 5, 2005.
Jul 5 2005	Petition for a writ of certiorari filed. (Response due August 8, 2005)
Jul 7 2005	Waiver of right of respondent Gene M. Johnson, Director, Virginia Department of Corrections to respond filed.
Jul 20 2005	DISTRIBUTED for Conference of September 26, 2005.
Jul 25 2005	Response Requested . (Due August 24, 2005)
Aug 9 2005	Order extending time to file response to petition to and including September 23, 2005.
Sep 23 2005	Brief of respondent Gene M. Johnson, Director, Virginia Department of Corrections in opposition filed.
Sep 23 2005	Brief amici curiae of Republic of Honduras, et al. filed.
Oct 4 2005	Reply of petitioner Mario A. Bustillo filed.
Oct 5 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 6 2005	Letter of October 6, 2005, from counsel for petitioner received. (Distributed)
Oct 24 2005	DISTRIBUTED for Conference of October 28, 2005.
Oct 31 2005	DISTRIBUTED for Conference of November 4, 2005.
Nov 7 2005	Petition GRANTED limited to Question 1 presented by the petition. This case is consolidated with No. 04-10566, Sanchez-Llamas v. Oregon, which is granted limited to Questions 1 and 2 presented by the petition, and a total of one hour is allotted for oral argument. VIDED.
Nov 21 2005	Motion for enlargement of time for oral argument, for divided argument, and for leave to participate in oral argument as amicus curiae. filed by the Solicitor General. VIDED.
Dec 8 2005	Consent to the filing of amicus briefs in support of either party received from counsel for petitionerSanchez-Llamas. VIDED.
Dec 12 2005	Motion enlargement of time for oral argument, for divided argument, and for leave to participate in oral argument as amicus curiae. GRANTED. The time is to be divided as follows: 45 minutes for the petitioners, 15 minutes for respondent in No. 04-10566, 15 minutes for respondent in No. 05-51, and 15 minutes for the Solicitor General as amicus curiae in support of respondents.
Dec 12 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent Johnson.
Dec 13 2005	Consent to the filing of amicus briefs in support of either party received from counsel for

	the petitioner, Bustillo. VIDED.
Dec 20 2005	Motion to dispense with printing the joint appendix filed by petitioners Moises Sanchez-Llamas. VIDED.
Dec 21 2005	Brief amici curiae of European Union and Members of the International Community filed. VIDED.
Dec 21 2005	Brief amici curiae of Ambassador L. Bruce Laingen, et al. filed VIDED.
Dec 22 2005	Brief amici curiae of Law Professors filed. VIDED.
Dec 22 2005	Brief amici curiae of Bar Associations, et al. filed. VIDED.
Dec 22 2005	Brief amici curiae of Former United States Diplomats filed. VIDED.
Dec 22 2005	Joint appendix filed.
Dec 22 2005	Brief of petitioner Mario A. Bustillo filed.
Dec 22 2005	Brief amicus curiae of American Bar Association filed.
Dec 22 2005	Brief amicus curiae of International Court of Justice Experts filed. VIDED.
Dec 22 2005	Brief amicus curiae of Association of the Bar of City of New York filed. VIDED.
Dec 23 2005	Brief amici curiae of Mid-Atlantic Innocence Project, et al. filed.
Dec 23 2005	Brief amici curiae of Republic of Honduras, and Other Foreign Sovereigns filed. VIDED.
Jan 9 2006	Application (05A624) of the Solicitor General for leave to file a consolidated amicus curiae brief in excess of page limits, submitted to The Chief Justice. VIDED.
Jan 10 2006	Extension of time within which to file respondent's brief on the merits to and including January 31, 2006. VIDED.
Jan 23 2006	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 23 2006	SET FOR ARGUMENT on Wednesday, March 29, 2006.
Jan 23 2006	CIRCULATED.
Jan 30 2006	Brief amicus curiae of Alliance Defense Fund filed. VIDED. (Distributed)
Jan 31 2006	Brief of respondent Gene M. Johnson, Director, Virginia Department of Corrections filed. (Distributed)
Jan 31 2006	Brief amicus curiae of United Statesl filed. VIDED. (Distributed)
Jan 31 2006	Brief amici curiae of Alabama, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Professors of International Law, et al. filed. VIDED. (Distributed)
Feb 9 2006	Motion for divided argument filed by petitioners. VIDED.
Feb 27 2006	Motion for divided argument filed by petitioner GRANTED.
Mar 7 2006	Reply of petitioner Mario A. Bustillo filed. (Distributed)
Mar 29 2006	Argued. For petitioner in N o. 04-10566: Peter Gartlan, Salem, Ore. For petitioner in No. 05-51: Mark T. Stancil, Washington, D.C. For respondent in No. 04-10566: Mary H. Williams, Oregon Solicitor General, Salem, Ore. For respondent in No. 05-51: William E. Thro, State Solicitor general, Richmond, Va; and Gregory G. Garre Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

No. 05-51 JUN 1 - 2005

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IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights.

2. Whether, in deciding if improperly withheld exculpatory evidence might have affected the outcome of the original trial and thus is "material" under *Brady* v. *Maryland*, 373 U.S. 83 (1963), a court may (a) refuse to consider the strength or weakness of the prosecution's evidence at the original trial; (b) analyze the potential effect of the withheld evidence on an item-by-item basis, rather than in the aggregate; (c) substitute its judgment for the likely effect on the jury by attempting to reconcile the exculpatory evidence with the original verdict; and (d) give determinative weight to the testimony of trial counsel that he was unsure whether the improperly withheld evidence would have affected the outcome of the trial.

3. Whether the Supreme Court of Virginia's refusal to hear petitioner's *Brady* claim on the ground that he did not file the transcripts of a hearing held during habeas corpus proceedings is an adequate and independent state ground of decision that precludes this Court's review of such claim.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the case in the Supreme Court of Virginia are named in the caption.

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IN THE

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MARIO A. BUSTILLO,

Petitioner,

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GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Mario A. Bustillo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App., *infra*, 1a–2a) is unreported. The May 4, 2004, decision of the Fairfax County Circuit Court (App., *infra*, 3a–16a) is unreported. The September 16, 2003, decision of the Fairfax County Circuit Court (App., *infra*, 19a–35a) is reported at 63 Va. Cir. 125 (Va. Cir. Ct. 2003); the February 21, 2003, decision of the Fairfax County Circuit Court (App., *infra*, 36a–37a) is unreported; and the August 8, 2002, decision of the Fairfax County Circuit Court (App., *infra*, 38a–48a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 7, 2005. On May 25, 2005, the Chief Justice extended the time for filing a petition for a writ of

certiorari to and including July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; the Due Process Clause of the Fifth Amendment to the Constitution, U.S. Const. amend. V; Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101; and the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, are set forth in the Appendix to the Petition at App., *infra*, 51a–55a.

STATEMENT OF THE CASE

The sole issue at petitioner Mario Bustillo's first-degree murder trial was *who* struck James Merry with a baseball bat at the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997. At trial, three witnesses said that petitioner, a Honduran national, committed the crime. Two eyewitnesses testified that petitioner was not the killer, and one identified a Honduran national nicknamed "Sirena"—now known to be Julio Osorto—as the man who struck and killed Merry. The day after Merry died, Sirena fled the country for Honduras. Since then, Sirena has admitted (and bragged) to friends, in surreptitiously videotaped conversations, that he was the one who struck Merry with a baseball bat.

At the time of trial, however, defense counsel could not locate Sirena and could not even present the jury with Sirena's true surname. Consequently, the Commonwealth mocked the defense theory that a "so-called Sirena" committed the crime; called Sirena's absence "convenient"; and questioned the credibility of the witness who saw him on a flight to Honduras the day after the victim's death. It now turns out that the Commonwealth had police reports showing that police officers stopped Julio Osorto—Sirena—near the crime scene shortly after the crime occurred; that

Sirena had what appeared to be red "ketchup" stains on his shirt and pants; that Sirena falsely told the police that he had not been at the Popeye's that night (even though the Commonwealth's own witnesses and others placed him there); that Sirena gave the police three conflicting stories about where he was coming from; and that another witness reported seeing Sirena cock a baseball bat to strike Merry.

But the Commonwealth failed to turn over those reports—which placed Sirena near the crime scene just after the murder with red stains on his clothes and offering false and conflicting alibis—to the defense before trial. Likewise, the Commonwealth failed to advise petitioner of his right, under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, to communicate with his consulate. The Honduran Consulate has submitted a declaration stating that, had it been consulted and advised of petitioner's defense—that another Honduran national had committed the crime—at the very least it would have: (a) supplied immigration records proving that Sirena entered Honduras the day after Merry died; (b) provided a photograph of Sirena; and (c) attempted to contact and interview Sirena to assist petitioner.

The United States has conceded that petitioner's Vienna Convention rights were violated and has issued an apology to Honduras. Notwithstanding the conceded violation and the significant evidence that Sirena rather than petitioner killed Merry, Virginia courts refused to consider petitioner's Vienna Convention claim. That refusal conflicts with the International Court of Justice's decision in *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31), which held that Article 36 creates individually enforceable rights and obligates signatories to adjudicate Article 36 violations despite possible procedural defaults. The Virginia courts also ignored a substantial violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), based on inadequate grounds.

I. Statutory Framework

The Vienna Convention is a "multilateral treaty that governs the establishment of consular relations between nations and defines the function of a consulate." *United States* v. *Emuegbunam*, 268 F.3d 377, 388 (6th Cir. 2001). Under Article 36 of the Vienna Convention, a signatory nation that detains a foreign national must promptly inform the foreign national's consulate of the detention upon the detainee's request:

> [I]f [the detained foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.

Vienna Convention, art. 36(1)(b), 21 U.S.T. at 101.

In addition, Article 36 specifically requires signatory nations *to advise* detained foreign nationals of their rights under the Vienna Convention. The detaining State must "inform the person concerned without delay of his rights under this sub-paragraph." Vienna Convention, art. 36(1)(b), 21 U.S.T. at 101. And signatories must ensure that their laws and regulations "enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Id.*, art. 36(2), 21 U.S.T. at 101.

In 1969, the United States became a party to the Vienna Convention. See 115 Cong. Rec. 30,997 (1969). At the same time, it ratified the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325. In ratifying the Optional Protocol, the United States agreed to submit any disputes regarding the "interpretation or application of the Convention" to the International Court of Justice ("ICJ") for resolution. *Id.* art. I, 21 U.S.T.

at 326. On March 7, 2005, the United States withdrew from the Optional Protocol. *Medellín* v. *Dretke*, 125 S. Ct. 2088, 2101 (2005) (O'Connor, J., dissenting) (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

II. Proceedings In This Case

A. The Murder Trial And Direct Review

There is no dispute that someone brutally killed James Merry by striking him in the head with a baseball bat as he smoked a cigarette outside the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997. The only dispute is who did it. The Commonwealth has accused petitioner, a Honduran national. Petitioner insists that another Honduran national—a man known as "Sirena," whose real name is Julio Osorto—killed Merry.

There was no physical evidence connecting petitioner to the crime. The Commonwealth's first-degree murder case against petitioner was based solely on the testimony of three eyewitnesses who claimed that they saw the attack from within the Popeye's restaurant. They identified petitioner as the assailant, relying in part on their recollections that the attacker wore a red shirt and that petitioner was wearing a red shirt. 3/17/98 Tr. at 131–132, 224–225; 3/18/98 Tr. at 36. They admitted, however, that the attack lasted only seconds and that, although the attack occurred outside the restaurant after dark, their observations were made from within the brightly lit restaurant, through a glass window that was partially obstructed by the advertising poster against which Merry was leaning. 3/17/98 Tr. at 127–128, 131, 142, 156–157, 161, 222, 241–242, 249, 251; 3/18/98 Tr. at 20, 24–25, 27–28, 30. The Commonwealth also presented the testimony of Detective Richard Cline, who said that none of the witnesses he interviewed during his investigation of the murder identified anyone other than petitioner as the attacker. 3/18/98 Tr. at 69.

Petitioner presented the testimony of two eyewitnesses who were standing near Merry outside the restaurant when the attack occurred. Amilcar Amaya testified that he was just leaving Popeye's when he saw a man he knew as "Sirena" approach Merry, take out a baseball bat, and strike him in the head. 3/18/98 Tr. at 100–101. Christina Hondoy testified that, shortly before the attack, she had stepped out of the Popeye's with a friend (Yahayra Quieroloa) to smoke a cigarette. *Id.* at 141–142. She had just turned to say something to Merry, who was standing steps away, when she saw someone strike him in the head with a baseball bat. *Id.* at 142. She did not know who had assaulted Merry, but she stated unequivocally that she knew that it was not petitioner. *Ibid.*

Another witness, Ulma Martinez, testified that she saw Sirena on a flight to Honduras the day after Merry died. 3/18/98 Tr. at 167–168. On cross-examination, Martinez admitted that she did not know Sirena's last name. *Ibid.* Two of petitioner's high school teachers testified that petitioner's demeanor on the day after the assault was inconsistent with that of a person who had brutally assaulted someone the night before. *Id.* at 115–118, 132–135.

In closing argument, the Commonwealth urged that there was no credible evidence that Sirena, rather than petitioner, had committed the murder, 3/19/98 Tr. at 18, 75, 76, despite the fact that one of its own witnesses placed Sirena at the Popeye's at the time of the attack, 3/17/98 Tr. at 129. The Commonwealth dismissed Amilcar Amaya as a "gang member," 3/19/98 Tr. at 19–20, and argued that Hondoy had been given loans by the Bustillo family, *id.* at 22–23. The "whole Sirena thing," the Commonwealth urged, was "very convenient" because "Sirena apparently isn't available." *Id.* at 20. The Commonwealth even cast doubt on whether "this so-called Sirena" existed, pointing out that neither Amilcar Amaya (who testified that he saw Sirena strike Merry), nor Ulma Martinez (whom the

Commonwealth characterized as "supposedly" having seen Sirena flee to Honduras the day after Merry's death) actually "kn[e]w his full name." *Id.* at 20, 75. And the Commonwealth pointed out that no one had produced "plane tickets * * * for this Sirena." *Id.* at 20–21, 75.

But the jury (like the defense) was not told that the police in fact had stopped Sirena in the area of the crime scene shortly after the assault. The jury (like the defense) was not told that Sirena, when stopped, gave false and inconsistent explanations of where he was coming from. The jury (like the defense) was not told that the officers observed red stains on Sirena's pants and shirt. And the jury (like the defense) was never told that official Honduran immigration documents confirmed that Sirena—Julio Osorto—in fact had fled to Honduras on the flight identified by Ulma Martinez. Finally, although the police knew petitioner was a Honduran national when they detained him, at no point was petitioner advised of his right to contact the Honduran Consulate.

The jury returned a verdict of guilty, 3/19/98 Tr. at 83, and sentenced petitioner to 30 years' imprisonment, 3/20/98 Tr. at 24. While petitioner's appeal to the Virginia Court of Appeals was pending, petitioner received a declaration from the Honduran Consulate stating that it had not been informed of the charges against petitioner and that, had it been so informed, it would have provided him with assistance. Habeas Pet. Exh. 8. Petitioner moved to remand the case to the trial court because, *inter alia*, the Commonwealth had violated his Vienna Convention rights by failing to inform him of his rights under that treaty. The court denied the motion, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 and 2422-98-4, at 13–14 (Va. Ct. App. June 1, 1999), and affirmed the conviction, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4, 2422-98-4, 2000 WL 365930 at *3, (Va. Ct. App. Apr. 11, 2000). The Supreme Court of Virginia denied the petition for appeal, *Bustillo* v. *Com-*

monwealth, No. 001110, slip op. at 1 (Va. Jan. 17, 2001), and this Court denied further review, *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

B. Proceedings On State Habeas

Petitioner sought a writ of habeas corpus in the Circuit Court for Fairfax County based on newly discovered evidence, violations of the duty to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and a violation of Article 36 of the Vienna Convention.

1. *The New Evidence And Vienna Convention Claims.* The new evidence consisted of, among other things, a surreptitiously recorded videotape in which Sirena admitted killing Merry. See Habeas Pet., Exh. 9, at 3–4. On the tape, another Honduran national (working in connection with petitioner's new counsel) recorded Sirena bragging about the killing to his friends. The description was nothing short of brutal: "When I smashed [Merry] with that blow * * * I heard that son of a bitch sound like a big box." *Id.* at 6. Consistent with the witness testimony, Sirena specified that he attacked Merry with a baseball bat while Merry was outside the Popeye's smoking a cigarette. *Id.* at 4. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been wearing a red sweater. *Id.* at 7. Sirena also stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. *Id.* at 6–7.

The habeas petition included a copy of the videotaped confession, together with the affidavits of four different eyewitnesses who swore that, upon viewing the videotape, they "recognized the individual facing the camera" (Sirena) as the person they saw "committing the December 10, 1997, assault" on Merry. Habeas Pet. Exhs. 11–14. It also included sworn affidavits by several witnesses who, based on a photograph of Sirena produced by the Honduran Consulate, identified Sirena as the attacker; several explained that they had not come forward earlier because they feared being deported. See *id.*, Exhs. 16, 21, 28, 29, 32.

Petitioner also asserted that his conviction was obtained in violation of Article 36 of the Vienna Convention. He swore that, if he had been advised of his right to contact the Honduran Consulate, he would have done so. Habeas Pet. Exhs. 7, 14b. The Honduran Consulate in turn executed an affidavit declaring that, had it been apprised of the case, it would have (at a minimum) confirmed Julio Osorto/Sirena's existence and nationality, provided official records of his arrival in Honduras just after Merry's death, attempted to interview Sirena, and provided the defense with Sirena's picture. See *id.*, Exh. 26.

On August 8, 2002, the Circuit Court denied petitioner's new evidence and Vienna Convention claims. With respect to the new evidence claims, the Circuit Court held that newly discovered evidence is not a ground for habeas relief. App., *infra*, 41a. With respect to the Vienna Convention claim, the court held that it was procedurally defaulted because petitioner did not raise it at trial. *Id.* at 47a.

2. *The* Brady *claim.* Petitioner also alleged that the prosecution had unlawfully withheld exculpatory evidence in violation of *Brady*. Although the Circuit Court initially denied those claims, App., *infra*, 37a, the court eventually reconsidered and granted petitioner's motion to compel production of the Commonwealth's investigation files and all information about Sirena. In response, the Commonwealth for the first time disclosed the police report of Officer Christopher Mahoney and the investigation notes of Detective Richard Cline.

a. The Mahoney Report revealed that Officer Mahoney stopped "Julio C. Osorto," now known to be Sirena, while canvassing the crime scene hours after the fatal assault. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 1. According to the Mahoney Report, Sirena "had what appeared to be ketchup" on his shirt and pants. *Ibid.* The Report also indicated that Sirena gave conflicting statements about where he was coming from:

> [Mr. Osorto] claimed he had come from McDonald's * * *. Mr. Osorto originally stated he was coming from his cousin[']s residence on Cumberland Ave., then he stated he was coming from Commerce St. * * *. He stated he lived at Chelse[a] Square Apts. but was confused on the address.

Id. at 1–2. When asked whether he had been at Popeye's that evening, Sirena "stated he was not at Popeye[']s." *Id.* at 1. Sirena's breath smelled of alcohol. *Id.* at 1–2.

Detective Cline's investigation notes recorded that one witness placed "Julio – Sirena" at the crime scene. Notes of Detective Richard Cline, Dec. 18, 1997, at 1. Detective Cline's notes also revealed that, when he interviewed Jose Amaya several weeks after the attack, Amaya indicated that he saw both Sirena and petitioner at the Popeye's that evening and that, although he "[c]ouldn't tell ~~who~~ actually hit the guy," he "[s]aw Sirena take bat from [his] shirt" and "cock it" as he approached Merry. Notes of Detective Richard Cline, Jan. 7, 1998, at 3. Amaya said that Sirena had left the country for Honduras after the crime. *Id.* at 4.

b. After a hearing, the Circuit Court concluded that Officer Mahoney's report and Detective Cline's notes were clearly exculpatory and should have been disclosed to the defense before trial. Those documents, the court explained, "unquestionably implicate 'Sirena' * * * as a possible suspect," and thus "must be deemed exculpatory" within the meaning of *Brady*. App., *infra*, 27a, 28a. Although the Commonwealth had disclosed information in Detective Cline's notes that was favorable to the prosecution, it inexplicably "failed to disclose that [Jose] Amaya also told Detective Cline that he observed Sirena holding a bat in a cocked position. This latter piece of information not only makes clear that Sirena was present at the scene, but also implicates Sirena as the actual assailant." *Id.* at 27a.

The Circuit Court further held that the Mahoney Report also implicated Sirena rather than petitioner as the

assailant: The fact that "an individual named Julio Osorto was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing must be deemed exculpatory." App., *infra*, 28a. Although the blow to Merry's head produced a "closed head wound" (*i.e.*, it did not break the skin), and no blood was found on petitioner or the baseball bats recovered near the scene, the Circuit Court concluded that the red stains were relevant because "photographs of the crime scene depict[] what appears to be blood spatter." *Ibid.*; see *id.* at 24a–25a ("[T]he Commonwealth was certainly aware that Merry's blood was found at the scene * * *."). Because of that, and in light of "testimony identifying 'Sirena-Julio' as the assailant," the Circuit Court found that "the stopping of a 'Julio' near the crime scene at the time of the incident with red stains on his clothes[] is exculpatory in nature warranting its production to the defense prior to trial." *Id.* at 28a–29a.

c. The Circuit Court ordered a "limited hearing" to determine whether the improperly withheld *Brady* evidence was "material," App., *infra*, 34a, *i.e.*, whether "there is a reasonable probability that," but for the nondisclosure, "the factfinder would have had a reasonable doubt respecting guilt," *id.* at 29a–30a (quoting *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984)). At that hearing, petitioner's original trial counsel testified that he was "shocked" to learn of Detective Cline's notes and the Mahoney Report. *Id.* at 12a. He testified that, had he been presented with the Mahoney Report, he likely would have called Officer Mahoney to testify regarding his encounter with Sirena in order to bolster the defense's contention that Sirena was the assailant. *Id.* at 12a–13a. Moreover, because of the Commonwealth's "several references" at trial "to the fact that the defense called only one witness in support of its position that Sirena, not Bustillo, was the assailant," trial counsel "testified that this corroboration would have 'enhanced' the defense's position." *Id.* at 13a n.39. See also

id. at 12a n.38 (noting the difficulty of proving Sirena's existence and "presence at the Popeye's Restaurant the night Merry was attacked").

In response to the Circuit Court's apparent concern that the red stains on Sirena's clothing might be inconsistent with the fact that Merry suffered a "closed" head wound, petitioner presented the testimony of Dr. Peter Bernad, a licensed neurologist. Dr. Bernad testified that traumatic blows to the head like the one Merry had suffered can often cause blood to "aerate" (*i.e.*, to spray) "from the ear immediately upon impact." App., *infra*, 9a; see *id.* at 9a–10a (noting "Dr. Bernad's testimony that blood would have 'sprayed/aerated' from the victim's ear at some point upon or almost immediately after impact"). Two eyewitnesses to the attack, Yahayra Quieroloa and Amilcar Amaya, testified at the hearing that they saw blood spray when Merry was struck. *Id.* at 10a, 11a.

Following the hearing, the Circuit Court ruled that the suppressed evidence was not material. The court stated that, on habeas review, it "cannot consider or evaluate the weight or credibility of the evidence presented to the jury" at the original trial. App., *infra*, 15a. At the same time, the court downplayed the importance of both the red stains on Sirena's shirt and pants and the expert testimony that blood aerated from Merry's ear on impact. According to the court, "the crime scene photos revealed no signs of blood 'spray,' 'spatter' or droplets, but rather only a few sizable drops of blood * * * the Court finds consistent with blood seepage, not blood spatter." *Id.* at 10a. The court also disregarded Yahayra Quieroloa and Amilcar Amaya's testimony that they saw blood fly when Merry was struck. *Id.* at 10a, 11a. The court did not address the fact that Sirena lied to the police about having been at the Popeye's that night or his inconsistent statements. Finally, the Circuit Court relied heavily on the testimony of petitioner's trial counsel, who stated that he could not be certain that

disclosure of the *Brady* evidence would have altered the trial's outcome. *Id.* at 14a. The court deemed that testimony "instrumental" to its decision. *Ibid.*

C. The Supreme Court Of Virginia's Decision

In a one-page order, the Supreme Court of Virginia denied petitioner's petition for appeal. With respect to the Vienna Convention claim, the court stated that it was "of [the] opinion there is no reversible error in the judgment complained of * * * ." App., *infra*, 1a.

The Supreme Court of Virginia likewise denied review of the *Brady* claims. In advance of the ruling, the Commonwealth had moved to dismiss those claims because a transcript of a habeas hearing had been filed late in the trial court. (Although one reason the transcript was filed late was the court reporter's failure to meet a promised deadline, the court refused a request to permit late filing. See Motion to File Transcript Out of Time at 2.) Petitioner responded that, because his challenges were strictly legal in nature, the habeas court had made extensive factual findings upon which to base appellate review, and there were no challenges to those findings, the habeas hearing transcripts were unnecessary.

The Supreme Court of Virginia ruled that the appeal "was not perfected in the manner provided by law." App. *infra*, 1a. The court cited no authority. Nor did it address numerous Virginia decisions holding that such transcripts are not necessary to adjudicate *Brady* claims.

REASONS FOR GRANTING THE PETITION

This case concerns a conflict between this Nation's state and federal courts and the International Court of Justice ("ICJ") concerning the meaning of, and the obligations imposed by, Article 36 of the Vienna Convention on Consular Relations. In two decisions, the ICJ has held and reiterated that the Vienna Convention requires American courts to adjudicate the claims of foreign nationals asserting that their convictions were obtained in violation of

the Vienna Convention and that the application of procedural-default rules to refuse such review is inconsistent with the Convention's requirements. State and federal courts, in contrast, have reached conflicting results, refusing to hear the claims of foreign nationals asserting Vienna Convention violations and invoking procedural default rules to bar review. There can be little doubt of the issue's importance. This Court recently granted a petition for a writ of certiorari implicating this conflict, *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005), but ultimately dismissed the petition as improvidently granted in light of changed circumstances relating to that case and potential procedural defects—none of which exists here.

There is no dispute that the Commonwealth of Virginia violated the Vienna Convention when, after arresting petitioner, it failed to advise him of his right to consult with and seek the assistance of the Honduran Consulate. Moreover, it is difficult to imagine circumstances in which the aid of the consulate could be more critical than it was here. The violation denied petitioner access to the assistance of *Honduran officials* in his effort to show that *another Honduran national* who had *fled to Honduras* had committed the offense. Furthermore, it is now known that, shortly after the murder, Virginia police officers encountered that Honduran national—known as Sirena—near the murder scene; that Sirena gave the officers false and conflicting statements of where he was coming from; that the police observed red stains on Sirena's shirt and pants; that Sirena was seen by another witness cocking a bat to strike the victim; that Sirena fled to Honduras the day after the victim died; and that Sirena has since been recorded on videotape bragging that he committed the murder. Because petitioner was deprived of the assistance of Honduran officials, however, petitioner could not even prove that Sirena fled to Honduras, much less obtain the videotaped confession that counsel was able to procure

through informants once Sirena's identity and location were determined. Simply put, the Vienna Convention violations, along with serious violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), caused petitioner to be convicted and sentenced for an act he did not commit.

I. This Court Should Address The Conflict Concerning The Proper Construction Of Article 36 Of The Vienna Convention

A. United States And International Courts Are In Disarray Over The Interpretation Of Article 36

The United States has been a party to the Vienna Convention for over 30 years. In that time, the decisions of state and federal courts interpreting the Convention have increasingly come to conflict with rulings of the International Court of Justice.

1. Twice in the past five years the ICJ has ruled that the Vienna Convention creates individual rights and that United States courts must adjudicate claimed violations despite procedural defaults. In *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27), the ICJ rejected the contention that individual defendants cannot raise Vienna Convention claims because any rights the Convention creates are the "rights of States, and not of individuals." *Id.* ¶ 76. Invoking "the text of" the Vienna Convention, the ICJ squarely held that Article 36 "creates individual rights." *Id.* ¶ 78. The ICJ further held that the application of procedural default rules in that case violated paragraph 2 of Article 36 by preventing "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91 (quoting Vienna Convention, art. 36(2), 21 U.S.T. at 101).

Last year, the ICJ reiterated and expanded on its interpretation of Article 36 in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31). In *Avena*, Mexico argued that the United States had denied 51 Mexican nationals their Vienna Convention

rights. *Id.* ¶ 12. Citing *LaGrand*, the ICJ again held that Article 36 gives detained foreign nationals individually enforceable rights that they can "assert[] within the domestic legal system of the United States." *Id.* ¶ 40. And, as in *LaGrand*, the ICJ held that paragraph 2 of Article 36 prohibited courts from applying procedural default rules to bar consideration of claims under the Vienna Convention. *Id.* ¶ 113. As a remedy for those violations, the ICJ ordered the United States "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of the Mexican nationals named in the complaint, without regard to procedural default rules. *Id.* ¶ 153(9).

2. State and federal courts have reached contrary results. Confronted "with numerous claims based upon the Vienna Convention without the benefit of a definitive statement from" this Court, *United States* v. *Emuegbunam*, 268 F.3d 377, 391 (6th Cir. 2001), state and federal "[c]ourts have been unable to reach a consensus" on "whether Article 36 creates an individually enforceable right to consular notification," *United States* v. *Santos*, 235 F.3d 1105, 1107 (8th Cir. 2000) (citations omitted). For example, eight different federal and state courts (including the Supreme Court of Virginia) have, contrary to the ICJ, ruled that Article 36 does not create individual rights—an interpretation that would foreclose individual judicial remedies even on direct review.[1] Typically, those courts have based their decisions on the "general rule" that "international treaties do not create rights that are privately enforceable in the federal courts," as well as language in the

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[1] See *Cardenas* v. *Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *Emuegbunam*, 268 F.3d at 394; *Gomez* v. *Commonwealth*, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004); *State* v. *Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *State* v. *Sanchez-Llamas*, 108 P.3d 573, 578 (Or. 2005); *Cauthern* v. *State*, 145 S.W.3d 571, 626 (Tenn. Crim. App. 2004); *Shackleford* v. *Commonwealth*, 547 S.E.2d 899, 905 (Va. 2001); *State* v. *Navarro*, 659 N.W.2d 487, 494 (Wis. Ct. App. 2003).

Vienna Convention's preamble discussing its purpose. *Emuegbunam*, 268 F.3d at 389, 391–392.

Many federal district courts (and many court of appeals judges in dissent) have reached the opposite conclusion, agreeing with the ICJ's construction.[2] Those courts have looked to the plain text of Article 36 and concluded that "it is difficult to imagine 'how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national, and that the failure to promptly notify him/her of these rights constitutes a violation of these entitlements by the detaining authority.'" *Standt* v. *City of New York*, 153 F. Supp. 2d 417, 425 (S.D.N.Y. 2001) (quoting *United States* v. *Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, J., concurring and dissenting in part)). Those courts have rejected the claim that the Convention's preamble trumps the plain text of Article 36:

> [I]t appears that the purpose of [the preamble] is not to restrict the individual notification rights of foreign nationals, but to make clear that the Convention's purpose is to ensure the smooth functioning of consular posts in general, not to provide special treatment for individual consular officials.

Standt, 153 F. Supp. 2d at 425.

Even more so than in other contexts, the need for a uniform construction is paramount. "A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as

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[2] See *United States* v. *Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States ex rel. Madej* v. *Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *United States* v. *Hongla-Yamache*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *Standt* v. *City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States* v. *Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999); *United States* v. *Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, J., concurring and dissenting in part); *Breard* v. *Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 890 (9th Cir. 2000) (Boochever, J., dissenting).

possible." *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 337–338 (5th Cir. 1967) (Wisdom, J.). More important, the construction of an international treaty is an issue of international importance—particularly where state courts and the lower federal courts have interpreted the treaty in a manner that conflicts with the construction of international bodies and other signatories.[3]

3. There is also an international conflict on whether United States courts may refuse to remedy Vienna Convention violations where there is a procedural default. Years before *Avena* and *LaGrand* were decided, this Court addressed the issue in *Breard* v. *Greene*, 523 U.S. 371, 375 (1998) (*per curiam*). The Court recognized that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Id.* at 375. Finding no authoritative construction from the ICJ or other international body, the Court interpreted paragraph 2 of Article 36—"which provides that the rights expressed in the

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[3] Still more courts have sidestepped whether Article 36 creates judicially enforceable individual rights. See *United States* v. *Li*, 206 F.3d 56, 60 (1st Cir. 2000) (*en banc*); *United States* v. *De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *United States* v. *Lawal*, 231 F.3d 1045, 1048 (7th Cir. 2000); *United States* v. *Santos*, 235 F.3d 1105, 1108 (8th Cir. 2000); *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000); *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *Darby* v. *Hawk-Sawyer*, 405 F.3d 942, 946 (11th Cir. 2005); *Bieregu* v. *Ashcroft*, 259 F. Supp. 2d 342, 353 n.7 (D.N.J. 2003); *People* v. *Preciado-Flores*, 66 P.3d 155, 161 (Colo. Ct. App. 2003); *Conde* v. *State*, 860 So. 2d 930, 953 (Fla. 2003); *Lopez* v. *State*, 558 S.E.2d 698, 700 (Ga. 2002); *People* v. *Hernandez*, 745 N.E.2d 673, 682–683 (Ill. App. Ct. 2001); *Zavala* v. *State*, 739 N.E.2d 135, 140 (Ind. Ct. App. 2000); *State* v. *Buenaventura*, 660 N.W.2d 38, 45 (Iowa 2003); *Commonwealth* v. *Diemer*, 785 N.E.2d 1237, 1244 (Mass. App. Ct. 2003); *Ademodi* v. *State*, 616 N.W.2d 716, 717 (Minn. 2000); *Garcia* v. *State*, 17 P.3d 994, 996 (Nev. 2001); *People* v. *Ortiz*, 795 N.Y.S.2d 182, 183 (N.Y. App. Div. 2005); *State* v. *Issa*, 752 N.E.2d 904, 914–915 (Ohio 2001); *State* v. *Jamison*, 20 P.3d 1010, 1015 (Wash. Ct. App. 2001).

Convention 'shall be exercised in conformity with the laws * * * of the receiving State'"—to allow for the application of state procedural default rules. *Id.* at 375–376 (quoting Vienna Convention, art. 36(2), 21 U.S.T. at 101).

That ruling conflicts with the ICJ's subsequent determinations in *Avena* and *LaGrand* that applying procedural default rules to bar Vienna Convention claims violates Article 36's requirement that "full effect" be given to the Convention's protections. *Avena*, 2004 I.C.J. at ¶ 113; *LaGrand*, 2001 I.C.J. at ¶ 91. Because *Breard* was issued without benefit of those ICJ rulings, it is ripe for reconsideration. "In the past the Court has revisited its interpretation of a treaty when new international law has come to light." *Medellín*, 125 S. Ct. at 2105 (O'Connor, J., dissenting). *Breard*, moreover, is a *per curiam* opinion and was rendered under exigent circumstances without benefit of full briefing and argument. See *Breard*, 523 U.S. at 379–380 (Stevens, J., dissenting); *Torres* v. *Mullin*, 540 U.S. 1035, 1035–1036 (2003) (Stevens, J., respecting denial of certiorari). This Court has "felt less constrained to follow precedent" established under such circumstances. *Hohn* v. *United States*, 524 U.S. 236, 251 (1998).

This Court has the exclusive "prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). The Fifth Circuit, for example, has ruled that it cannot follow *Avena* because doing so would require it to "disregard [this] Court's holding in *Breard* that ordinary default rules can bar [Vienna Convention] claims." *Cardenas* v. *Dretke*, 405 F.3d 244, 253 (5th Cir. 2005). If the courts of this Nation are to "give respectful consideration to the interpretation of an international treaty rendered by an international court," that consideration must come from this Court.

B. The Vienna Convention Issues Have Overwhelming National And International Importance

There is no doubt that the Vienna Convention issues raised here warrant this Court's review. The Court has already granted a petition for a writ of certiorari to resolve closely related questions, see *Medellín* v. *Dretke*, cert. granted, 125 S. Ct. 686 (2004). This Court dismissed the writ as improvidently granted in that case, not because the issues were unworthy of review, but because the case came "freighted with formidable threshold issues that deter definitive answers to the questions presented." 125 S. Ct. at 2095 (Ginsburg, J., concurring). After the Court granted the petition, the President issued a memorandum that could entitle "the 51 Mexican nationals addressed in" the *Avena* decision (including Medellín himself) to relief in state court. Relying on that memorandum, Medellín filed a state habeas action that could "provide [him] with the review and reconsideration of his Vienna Convention claim that" he was seeking from this Court. That new development, together with five different procedural impediments to review arising from the fact that his claim was asserted in federal habeas proceedings, led the Court to dismiss the writ. *Medellín*, 125 S. Ct. at 2090–2092.[4]

None of those threshold issues is present here. This case arises on state rather than federal habeas, so the procedural hurdles related to the latter pose no barrier to review. Further, petitioner is not one of the 51 individuals

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[4] The Court noted that (1) a violation of the Vienna Convention may not be cognizable on federal habeas at all under *Reed* v *Farley*, 512 U.S. 339 (1994); (2) no relief is available in federal habeas unless the prior state adjudication "was contrary to, or an unreasonable application of, clearly established Federal law"; (3) under *Teague* v. *Lane*, 489 U.S. 288 (1989), a federal habeas petitioner generally cannot seek to enforce a "new rule of law"; (4) a habeas petitioner cannot seek further review absent a certificate of appealability, which may be available only for violations of *constitutional* rather that statutory or treaty rights; and (5) Medellín might not have exhausted state remedies.

entitled to relief under the *Avena* judgment and the Presidential memorandum. State habeas proceedings thus do not provide an alternative means of obtaining review of his Vienna Convention claims. In that respect, this case is more important than *Medellín*. *Medellín* arguably focused on whether the ICJ's ruling in *Avena* should be given effect for the limited number of Mexican nationals specifically identified as entitled to relief in the *Avena* judgment.[5] This case, in contrast, involves the much larger number of foreign nationals who are not mentioned in such a judgment, and who therefore must assert their rights under the text of Article 36 itself, as well as principles of comity and the respect due to the ICJ's construction. This case, moreover, specifically presents for review questions underlying and subsumed in the ICJ's judgments in *Avena* and *LaGrand*, namely "whether Article 36(1)(b) of the Convention creates a judicially enforceable individual right; and * * * whether Article 36(2) of the Convention sometimes requires state procedural default rules to be set aside so that the treaty can be given 'full effect.'" *Id.* at 2095 (O'Connor, J., dissenting).

Those questions deserve this Court's consideration. In 2003, our state prisons held more than 56,000 non-United States citizens, and, as of February 2005, 119 noncitizens were on death row. Accordingly, these are "questions that will inevitably recur." 125 S. Ct. at 2096 (O'Connor, J., dissenting). Even a cursory search of the case law reveals that detained foreign nationals regularly assert new Vienna Convention claims. See pp. 16–18 & nn.1-3, *supra*. Resolution of these questions has tremendous diplomatic signi-

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[5] The questions presented in *Medellín* were "whether a federal court is bound by the [ICJ's] ruling that United States courts must reconsider José Medellín's claim for relief under the Vienna Convention on Consular Relations, without regard to procedural default doctrines"; and "whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment." 125 S. Ct. at 2089.

ficance as well. Sovereign nations have haled the United States into the ICJ alleging violations of the Vienna Convention based on the failure to provide adequate judicial review. See *Avena*, 2004 I.C.J. 128; *LaGrand*, 2001 I.C.J. 104. The case may also have profound consequences for the treatment of United States citizens detained abroad, because foreign nations may refuse to apply the Vienna Convention more broadly for United States citizens detained within their borders than the United States applies it for foreign nationals detained within the United States. The need for a definitive interpretation of Article 36 thus is no less pressing now than it was when the Court granted the petition in *Medellín*, and this case provides an ideal vehicle, "shorn of procedural hindrances," 125 S. Ct. 2093 (Ginsburg, J. concurring), for addressing the matter.

C. Petitioner Was Severely Prejudiced By The Violation Of His Vienna Convention Rights

The violation of the Vienna Convention here deprived petitioner of crucial evidence corroborating that Sirena—not petitioner—killed James Merry. It was, after all, Sirena whom the police found near the crime scene shortly after the crime, with red stains on his shirt and pants; it was Sirena who, after being stopped, gave the police false and inconsistent statements about where he was coming from; it was Sirena who fled to Honduras the day after Merry died; and it was Sirena who later bragged to friends about having committed the murder—describing it in graphic detail—in a secretly videotaped conversation.

It is hard to imagine a case where the denial of consular assistance could be more prejudicial. Petitioner's defense was not merely that he, a Honduran national, did not commit the crime. It was that *another Honduran national*, Sirena, committed the crime and that Sirena had fled *to Honduras* the day after the victim died. Sirena's flight, if proven, itself would have been powerful evidence of Sirena's guilt and petitioner's innocence. See *California* v. *Hodari*

D., 499 U.S. 621, 624 n.1 (1991) (The guilty "flee when no man pursueth.") (quoting Proverbs 28:1); *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight * * * is the consummate act of evasion" that is "suggestive" of "wrongdoing"). It is in precisely such circumstances that consular officials, with their unique access to immigration records and law enforcement officers to find and interview suspects within their Nation's borders, are most useful.

Here, for example, the defense had great "difficulty finding evidence to corroborate the existence of" a Honduran national "named 'Sirena.'" App., *infra*, 12a n.38. Exploiting that, the prosecution suggested to the jury that Sirena was a convenient defense fabrication. The Commonwealth's closing argument referred to "this so-called Sirena"; pointed out that no one seemed even to know his last name; and repeatedly called him and his unavailability "convenient." 3/19/98 Tr. at 20–21, 75. The prosecution likewise dismissed Ulma Martinez's testimony that she saw Sirena on a flight to Honduras the day after Merry died, asserting that "[s]he still doesn't know [Sirena's] full name"; that "[t]he plane tickets you have are for that witness, not for this Sirena"; and casting doubt on whether the "so-called Sirena" "was on the plane" at all. *Ibid.*

Had the Commonwealth apprised petitioner of his Vienna Convention rights, those arguments—virtually the entirety of the Commonwealth's response to the Sirena defense—would have been unavailable. The Government of Honduras has represented that, had it been advised of the case, it at least would have been able to provide biographical data and a picture of Sirena as well as official documents confirming that Sirena entered Honduras just after Merry died. Habeas Pet. Exhs. 26, 26a, 26b.[6] That would have

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[6] The Commonwealth has never disputed petitioner's sworn statement that, had he been informed of his rights, he would have requested to speak with consular officials. See Habeas Pet. Exhs. 7, 14b. Nor has the

dramatically altered the course of trial. It would have precluded any suggestion that Sirena was a convenient defense invention, for he would be a real person with a picture and biographical data. It would have precluded the Commonwealth's effort to suggest that Sirena's suspicious and sudden departure was fiction, for it would have shown that he had fled to Honduras the day after Merry died, precisely as Ulma Martinez had testified. And it likely would have led to still further information implicating Sirena and exculpating petitioner. When the police interviewed witnesses, none of them was shown Sirena's photo; they were shown only petitioner's. But when confronted with the photo of Sirena later provided by the Honduran government, several witnesses identified Sirena as the individual who struck Merry. *Id.*, Exhs. 16, 21, 28, 29, 32.

Honduras has also represented that it would have attempted to locate Sirena and interview him. Habeas Pet. Exh. 8, at 3. The potential impact of such an effort should not be underestimated. Acting with fewer resources and no law enforcement experience, petitioner's habeas counsel ultimately was able to locate Sirena in Honduras and convince an associate of Sirena's to surreptitiously videotape conversations with Sirena—conversations in which Sirena confessed to Merry's killing with self-authenticating detail. Consistent with the witness testimony, Sirena stated that he attacked Merry with a baseball bat while Merry was outside the Popeye's smoking a cigarette. *Id.*, Exh. 9, at 4. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been wearing a red sweater. *Id.* at 3, 7. And, consistent with the Mahoney Report's statement that Sirena had alcohol on his breath when stopped by police, Sirena stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. *Id.* at 6–7. That lattermost assertion is particularly striking

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Commonwealth disputed the statements of Honduran officials that they could have provided significant assistance. *Id.*, Exhs. 8, 26.

because, at the time of Sirena's confession, the Mahoney Report—and its statement that Sirena's breath smelled of alcohol—had not yet been disclosed. Better self-authenticating detail is difficult to imagine.

Consequently, this is not a case in which the claimant is unable to identify potential prejudice from a violation of the Vienna Convention. Contrast *Medellín*, 125 S. Ct. at 2091; *Breard*, 523 U.S. at 377. Nor is this a case where the defendant seeks to exclude evidence of his guilt to remedy the alleged violation. See, *e.g.*, *Santos*, 235 F.3d at 1108. Rather, Virginia's failure to observe petitioner's Vienna Convention rights deprived him of evidence that not only raises reasonable doubt about his guilt, but also strongly supports his innocence.

II. The Virginia Courts' Denial Of Petitioner's *Brady* Claims Warrants Review

A. The Circuit Court's Ruling On Materiality Contravenes This Court's Precedents

It is well established that exculpatory evidence is material under *Brady* if "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler* v. *Greene*, 527 U.S. 263, 289 (1999) (internal quotation marks omitted); see *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). Consequently, if there is a reasonable probability that the suppressed material would have raised a reasonable doubt in the mind of even a single juror, reversal is required. See *United States* v. *Bagley*, 473 U.S. 667, 678 (1985). There can be no dispute that the Mahoney Report and Detective Cline's notes meet that standard.

The sole issue before the jury at trial was whether petitioner or "Sirena" killed James Merry. Four years after the trial, the Commonwealth disclosed a police report revealing that an officer stopped and interviewed the person now known to be Sirena near the crime scene on the night of the attack; that the officer observed "what

appeared to be ketchup" on Sirena's pants and shirt; and that Sirena gave false and inconsistent accounts of where he was coming from and where he had been. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 1–2. Around the same time, the Commonwealth disclosed a detective's notes indicating that an eyewitness to the murder saw Sirena at the crime scene approaching the victim with a "cock[ed]" bat, and further indicated that Sirena had left the country. Notes of Detective Richard Cline, Jan. 7, 1998, at 3.

Particularly in the context of a trial rife with conflicting eyewitness testimony—and with serious potential for witnesses to confuse one Honduran national for another—that evidence would have provided crucial corroboration for petitioner's defense. Indeed, it would have wholly eliminated the prosecution's repeated suggestions to the jury that the "so-called" alternative suspect (Sirena) was a "convenient" defense contrivance. 3/19/98 Tr. at 20–21, 75. Even setting aside the red stains on Sirena's clothes (and the absence of any stains on petitioner's clothes), the fact that Sirena gave false and conflicting statements to the police is particularly powerful evidence of his guilt and petitioner's innocence. See *United States* v. *Diaz-Carreon*, 915 F.2d 951, 954–955 (5th Cir. 1990) (inconsistent statements are often "the strongest evidence of a criminal defendant's guilty knowledge"; they are so "inherently suspicious" that a "factfinder could reasonably conclude that they mask an underlying consciousness of guilt"). Likewise, Sirena's suspicious departure to Honduras just after the victim died suggests a guilty mind. See p. 23, *supra*. There thus can be little doubt that, had the *Brady* evidence been properly produced, there is a "reasonable probability" that the trial's outcome would have been different. See, *e.g.*, *Kyles*, 514 U.S. at 441–454.

In reaching the opposite result, the Circuit Court disregarded the standards established by this Court. First, the Circuit Court failed to assess materiality in light of the

divided eyewitness testimony at trial, asserting that it was not permitted to "consider or evaluate the weight or credibility of evidence presented to the jury" at the original trial. App., *infra*, 15a. This Court, however, has emphasized that materiality must be determined in light of the weight and quality of evidence presented at trial. See *United States* v. *Agurs*, 427 U.S. 97, 113 (1976) ("[I]f the verdict is * * * of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."). Compounding that error, the Circuit Court did not analyze the potential effect on the jury's verdict; instead, it attempted to reconcile the exculpatory evidence with a guilty verdict. For example, downplaying the significance of the red stains on Sirena's shirt and pants, the court suggested that there was little evidence of blood splatter at the crime scene. But the Circuit Court itself repeatedly indicated that there were photographs suggestive of blood at the scene. See p. 11, *supra*. Moreover, any absence of blood spatter at the scene is consistent with most of the aerating blood having spattered on the assailant's—Sirena's—shirt and pants.

The Circuit Court, moreover, addressed each item of exculpatory evidence individually, failing to consider the cumulative effect of Sirena being found near the scene, the red stains, his false and inconsistent explanations of where he was going, his being seen approaching the victim with a cocked bat, and his departure for Honduras. Under this Court's precedents, materiality must be assessed "in terms of the cumulative effect of [the] suppress[ed]" evidence, "not item by item." *Kyles*, 514 U.S. at 436–437; see *id.* at 440–441. Likewise, the Circuit Court erred by deeming the testimony of petitioner's trial counsel—who indicated only that he was unsure whether the suppressed evidence would have altered the outcome of the trial—"instrumental" to its conclusion that the withheld evidence was not material. App., *infra*, 14a. A court may not substitute the opinion of

trial counsel for analysis of the evidence. And the fact that trial counsel is unsure of the likely impact reinforces the claim of prejudice. The defendant need not show that the exculpatory evidence *would have* changed the verdict. Instead, he need show only that there is a "reasonable probability" of a different result—*i.e.*, a reasonable probability that one juror would have had a reasonable doubt. *Strickler*, 527 U.S. at 289. Here, there is at least a reasonable probability that the exculpatory evidence would have raised a reasonable doubt in the mind of one juror.

B. The Supreme Court of Virginia's *Brady* Ruling Is Not Based On An Adequate And Independent State Ground

Notwithstanding compelling evidence that the wrong person was convicted as a result of patent *Brady* errors, the Supreme Court of Virginia refused to hear this case, stating that "the appeal was not perfected in the manner provided by law * * * because the appellant failed to file the habeas proceeding transcript(s)." App., *infra*, 1a. Ordinarily, the invocation of a state procedural bar will prevent this Court from considering a federal constitutional claim if the procedural rule is "firmly established and regularly followed," *James* v. *Kentucky*, 466 U.S. 341, 348–349 (1984), and is "appl[ied] evenhandedly to all similar claims," *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982). Here, however, the Supreme Court of Virginia's ground of decision does not meet those standards. The court cited no authority to support the assertion that habeas transcripts are necessary to "perfect" an appeal. Nor did it identify any other instance in which such a rule had been applied.

In fact, Virginia law is to the contrary. Under the Virginia rules, transcripts must be filed if they are "*necessary* to permit resolution of appellate issues." Va. S. Ct. R. 5:11(b) (emphasis added). Consistent with that standard, Virginia courts routinely permit review—including review of *Brady* claims—"where the record on

appeal without a transcript or a written statement of facts is sufficient to determine the merits of the appellant's allegations." *Carlton* v. *Paxton*, 415 S.E.2d 600, 603 (Va. Ct. App. 1992); *Wolfe* v. *Commonwealth*, 371 S.E.2d 314, 315–316 (Va. Ct. App. 1988) (same); *Turner* v. *Commonwealth*, 341 S.E.2d 400, 402 (Va. Ct. App. 1986) (same). Indeed, Virginia courts have expressly stated that "nothing in the Rules" makes the filing of a trial transcript mandatory. *Turner*, 341 S.E.2d at 402; see *Wolfe*, 371 S.E.2d at 315 ("[T]he failure to file a [trial] transcript does not remove our jurisdiction.").

Here, the transcripts of petitioner's 1998 criminal trial, the wrongfully withheld *Brady* materials, and the Circuit Court's extensive factual findings in its various opinions were all part of the record. Those items were sufficient under Virginia law, as the Supreme Court of Virginia's own precedents make clear. See *Roe* v. *Roe*, 324 S.E.2d 691, 692 n.1 (Va. 1985) (denying motion to dismiss under court rules despite "fail[ure] to include the [hearing] transcript" because the record "contains a detailed recital of facts found by the court and essential to its decision"); *Salmon* v. *Commonwealth*, 529 S.E.2d 815, 817 (Va. Ct. App. 2000) (holding claim "not barred by the lack of the hearing transcript"); *Goodpasture* v. *Goodpasture*, 371 S.E.2d 845, 846–847 (Va. Ct. App. 1988) (fact that "transcript or written statement of facts was [not] filed" not a bar to appellant's claim where "[a]ll of the facts necessary to decide" the appeal were "sufficiently set forth" in the lower court's opinion). Here, moreover, the grounds for review were all legal in nature—they addressed errors in the Circuit Court's reasoning—making the transcripts irrelevant.

The absence of habeas hearing transcripts relating to materiality, moreover, is not an *independent* state ground. As a matter of federal law, materiality is "assessed in light of the evidence adduced against the defendant *at trial*." *Leka* v. *Portuondo*, 257 F.3d 89, 104 (2d Cir. 2001)

(emphasis added); see *United States* v. *Ellis*, 121 F.3d 908, 918 (4th Cir. 1997) (materiality is determined in light of "the whole case, taking into account the effect that the suppressed evidence, had it been disclosed, would have had on the evidence considered *at trial*.") (emphasis added). This Court and others routinely resolve *Brady* claims without hearings on the issue of materiality, by comparing the strength and nature of the evidence introduced at trial to the suppressed evidence. See, *e.g.*, *Strickler*, 527 U.S. at 290–296 (assessing materiality based on comparison between the trial record and suppressed evidence); *Kyles*, 514 U.S. at 441–454 (examining suppressed evidence in light of testimony and evidence introduced at trial to determine materiality). Here, the Supreme Court of Virginia offered no reason for concluding the transcripts were necessary to resolve the federal question of whether the Circuit Court's materiality analysis was consistent with *Brady*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2005

APPENDIX A

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 042023
CIRCUIT COURT NO. L201879

MARIO A. BUSTILLO,
APPELLANT,

AGAINST

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
APPELLEE.

Monday, March 7, 2005

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law with regard to assignments of error nos. 1 through 5 because the appellant failed to file the habeas proceeding transcript(s), the Court dismisses the petition for appeal as to those assignments of error.

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of with regard to assignment of error no. 6. Accordingly, the Court refuses the petition for appeal as to that assignment of error.

Chief Justice Hassell took no part in the decision of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

/s/

Deputy Clerk

APPENDIX B

[Judicial Seal Omitted]

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
(703) 246-2221 Fax: (703) 385-4432

COUNTY OF FAIRFAX

MICHAEL P. McWEENY
MARCUS D. WILLIAMS
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG
JANE MARUM ROUSH
M. LANGHORNE KEITH
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LESLIE M. ALDEN
KATHLEEN H. MACKAY
JONATHAN C. THACHER
R. TERRENCE NEY
GAYLORD L. FINCH, JR.
RANDY I. BELLOWS

JUDGES

CITY OF FAIRFAX

BURCH MILLSAP
BARNARD F. JENNINGS
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THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
JACK B. STEVENS
J. HOWE BROWN
F. BRUCE BACH

RETIRED JUDGES

May 4, 2004

Stephen McCullough, Esquire
Assistant Attorney General
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
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Re: *Mario Bustillo v. Gene M. Johnson*, At Law No. 201879

Dear Counsel:

Pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief, this matter came before the Court on April 7, 2004 for a limited evidentiary hearing on the issue

of materiality with respect to certain exculpatory evidence the Commonwealth of Virginia failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

FACTS

On December 10, 1997 James Merry ("Merry") was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998 Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

After exhausting all of his appeals, Bustillo filed a Petition for a Writ of Habeas Corpus asserting, among other things, that the Commonwealth failed to disclose exculpatory evidence.[1]

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required to determine whether the Commonwealth possessed at the time of trial a photograph and videotaped confession of "Sirena," an individual who the defense said was responsible for the crime, and, if so, whether such evidence was exculpatory in nature.[3]

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[1] In his Petition for Habeas Relief, Bustillo also alleged that the Commonwealth engaged in improper and suggestive witness coaching; threatened and intimidated witnesses in exchange for incriminating testimony; failed to inform Petitioner of his Vienna Convention rights; had improper contact with a member of the jury; and prejudicially promoted Petitioner's alleged "gang" affiliation at trial. In addition, Bustillo claimed ineffectiveness of counsel.

[2] The Honorable Henry E. Hudson presided over the August 8, 2002 evidentiary hearing.

[3] The Petition with respect to all other issues raised was denied.

The evidentiary hearing was set for December 5, 2002. Prior to the hearing, this Court granted various discovery requests[4] made by Bustillo. Pursuant to the discovery orders,[5] the Commonwealth produced a photograph of "Sirena", a copy of Detective Cline's notes of an interview with one Jose Armando Amaya ("Amaya") dated January 7, 1998,[6] and a copy of Fairfax County Police Officer C.J. Mahoney's ("Mahoney") investigative report dated December 10, 1997 documenting his stop of an individual named Julio Osorto.[7] None of these items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, after finding no evidence that the Commonwealth possessed either a photograph or videotaped confession of Sirena at the time of trial, the Court denied the Petition for a Writ of Habeas Corpus.[8]

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[4] See this Court's Orders dated October 2, 2002 and November 15, 2002.

[5] *Id.*

[6] According to Detective Cline's notes dated January 7, 1998 Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. #3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997 contain the following notation: "Sirena – Julio" as being one of the persons present at the scene.

[7] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant. Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[8] The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on evidence furnished by virtue of the Court's 2002 discovery orders,[9] in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

On September 16, 2003 the Court granted Bustillo's Motion to Reconsider, finding that the information contained in Detective Cline's notes – in particular the note equating Julio and Sirena,[10] the note indicating that Sirena held a "cock[ed]" bat,[11] and the note documenting the Chelsea Square Apartment address,[12] – and the information contained in Officer Mahoney's Report – which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission – were exculpatory in nature and therefore should have been disclosed to the defense prior to trial.

With respect to the issue of materiality, the Court declined to set aside the verdict and order a new trial absent further evidence as to the probability that, had the evidence been disclosed to the defense, the result of the criminal trial might have been different.

A limited hearing on the issue of materiality was held on April 7, 2004.

ANALYSIS

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irre-

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[9] See note 4, *supra*.

[10] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[11] See Detective Cline's notes of his interview with Jose Armando Amaya dated January 7, 1998.

[12] *Id.* See also note 39, *infra*.

spective of the good faith or bad faith of the prosecution.[13] Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[14]

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome."[15] Thus, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[16] Rather, a petitioner has the burden of showing that when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's guilt.[17]

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[13] *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[14] *Id.*, citing *United States v. Bagley*, 473 U.S. 667 (1985). In addition, evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Soering*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919). Only when the proffered evidence tends to clearly point to some other person as the guilty party will such proof be admitted. *Id.*

[15] *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668 (1984). In further defining the materiality standard, the *Strickland* Court explained that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695.

[16] *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528 citing *United States v. Agurs*, 427 U.S. at 109-110.

[17] *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v.*

In addition, the Court – in addressing the materiality of exculpatory evidence on habeas review – may consider what defense counsel could have done or might have done differently had the evidence been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury.[18]

In support of the materiality of Detective Cline's notes and the Mahoney Report, Bustillo called four witnesses to testify about the presence of Sirena and/or blood spatter at the crime scene, matters which purportedly would have been further explored at trial and might have led to a different outcome had the Commonwealth disclosed the evidence to the defense.

Dr. Peter Bernad

Dr. Peter Bernad ("Dr. Bernad"), a licensed neurologist who reviewed Merry's autopsy report and treatment records in preparation for the April 7, 2004 hearing,[19] described Merry's injuries as severe blunt trauma to the left side of the head, multiple fractures, and destruction of bone and blood vessels.[20]

Dr. Bernad further testified that the blow to Merry's head likely resulted in a ruptured eardrum, thus allowing blood to "seep" out of the left ear canal.[21] With respect to time involved, Dr. Bernad explained that the blood would have had "significant velocity" to push through the tym-

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Commonwealth, 232 Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990).

[18] *William Evans-Smith v. John B. Taylor*, 30 Va. Cir. 116 (Loudon County Circuit Court, 1993).

[19] Dr. Frances Field, not Dr. Bernad, was the medical examiner who performed the autopsy of Merry in 1998.

[20] See testimony of Dr. Peter Bernad, April 7, 2004.

[21] *Id.*

panic membrane and exit the ear, and that given the injury sustained, bleeding would have occurred "almost immediately" after impact.[22]

On cross-examination, however, Dr. Bernad testified that he was not an expert on blood spatter.[23] In addition, he conceded that while blood may have aerated from the ear immediately upon impact, it was also possible that given such an injury, it could have taken a couple of seconds for blood to "seep" from the ear.[24] Moreover, Dr. Bernad testified that Merry's injury would not have produced a significant amount of bleeding.[25]

In reviewing Dr. Bernad's testimony in light of the existing record, including the crime scene photos, the prior testimony of the Commonwealth's expert regarding Merry's injuries,[26] and the prior testimony of several eyewitnesses,[27] his testimony fails to give rise to a reasonable doubt with respect to the nature of Merry's injuries and the closed head wound evidence shown by the Commonwealth.

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] At the 1998 trial, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98 p. 193. Dr. Frances Field further testified – consistent with Dr. Bernad's testimony – that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear and then out of the ear canal. Tr. 3/17/98 p. 193.

[27] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98 p. 131 (Michelle Guiterrez; Tr. 3/18/98 p. 222 (Jesse Konstanty); Tr. 3/18/98 p. 264 (Nicholas Parada); Tr. 3/18/98 p. 27 (Valeria Landaeta); Tr. 3/18/98 p. 100, 111 (Amilcar Amaya); Tr. 3/18/98 p. 142 (Christina Hondoy).

Notwithstanding Dr. Bernad's testimony that blood would have "sprayed/aerated" from the victim's ear at some point upon or almost immediately after impact, the crime scene photos revealed no signs of blood "spray," "spatter" or droplets, but rather only a few sizable drops of blood, the latter of which the Court finds consistent with blood seepage, not blood spatter.

Yahayra Quierola

Yahayra Quierola ("Quierola"), purportedly present at the Popeye's Restaurant the night Merry was attacked,[28] testified that upon hearing a "noise," she turned and saw blood on Merry's face and ears.[29] She further testified that her friend "Christina," also present at the scene, had droplets of blood on her shirt after the attack.[30]

On cross-examination, Quierola testified that she saw blood coming from Merry's ears only, in contradiction to a prior statement she made under oath that she saw "blood explode from [Merry's] ears, nose and throat."[31] In addition, Quierola could not recall when or how quickly the blood began to "spurt" from Merry's ears.[32]

The Court does not find Quierola's testimony either persuasive much less dispositive on any issue of materiality with respect to either Detective Cline's notes or the Mahoney Report.

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[28] Quierola did not testify at the 1998 trial. At the post-trial hearing hearing held on July 13, 1998, she identified a photo of Sirena and testified that he "looked like the assailant."

[29] See testimony of Yahayra Quierola, April 7, 2004.

[30] *Id.*

[31] *Id.*

[32] *Id.* Interestingly, only this witness testified to observing blood coming from *both* of Merry's ears.

Amilcar Amaya

Next, Amilcar Amaya ("Amaya") testified that he saw Julio Osorto a/k/a Sirena strike Merry with a baseball bat,[33] and that upon impact, he observed blood spray "in the direction of" and "over" Sirena.[34]

The Court does not find Amaya's testimony credible. First, although Amaya testified that he saw blood spray toward Sirena upon impact – suggesting that it was on Sirena's shirt – Amaya later clearly testified that he did *not* observe any blood on Sirena's shirt.[35]

Second, Amaya's testimony is inconsistent with his prior testimony. Neither at the 1998 trial nor in his post-trial affidavit(s) did Amaya testify about the presence of blood at the moment of impact.[36]

Absent credible testimony regarding the presence of blood on Sirena's shirt, the materiality of Mahoney's Report is wanting. In addition, although Detective Cline's notes – which reference "Sirena" – corroborate Amaya's testimony regarding Sirena's presence at the scene, they also place *Bustillo* at the scene, a fact plainly at odds with his alibi defense. As a result, the Court finds that Bustillo fails to demonstrate a reasonable probability that, but for the Commonwealth's nondisclosure of the notes, the result of the proceeding would have been different.[37]

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[33] See testimony of Amilcar Amaya, April 7, 2004. At the 1998 trial, Amaya testified that he was outside the Popeye's when he saw "Senior Julio" *also known as "Sirena"* take a bat and strike the victim. See testimony of Amilcar Amaya, Tr. 03/18/98 p. 99, 100-101, 110-111.

[34] See testimony of Amilcar Amaya, April 7, 2004.

[35] *Id.*

[36] See note 41, *infra*.

[37] The Court also notes that in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a. "Sirena", the jury would still have to disregard the substantial

David Bernhard

Lastly, David Bernhard ("Bernhard"), Bustillo's defense attorney at trial, was called to testify about possible defense strategies that might have been employed had the Commonwealth produced Detective Cline's notes and the Mahoney Report.

During the 1998 trial, the defense, relying primarily on an alibi defense, also argued that someone other than Bustillo, namely "Sirena", a.k.a. Julio, had struck and killed Merry.

In addressing the materiality of the undisclosed evidence, Bernhard testified that he was "shocked" to learn of the existence of Detective Cline's notes and the Mahoney Report because both tended to corroborate the existence and presence of Sirena at or near the crime scene shortly after the attack.[38] Bernhard further testified that had he possessed the exculpatory documentation at the time of trial, he likely would have called Officer Mahoney to testify

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evidence presented at the 1998 trial that Bustillo was the assailant. For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrez testified that both "Sirena" and Bustillow were present at the crime scene and that Bustillo was the one who took a bat and struck the victim. Testimony of Michele Gutierrez, Tr. 03/17/1998 p. 129-131. Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant. Testimony of Jesse Konstanty, Tr. 3/17/98 p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98 p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98 p. 36.

[38] See testimony of David Bernhard, April 7, 2004. Bernhard testified that in preparing for trial, the defense had difficulty finding evidence to corroborate the existence of an individual named "Sirena" and/or his presence at the Popeye's Restaurant the night Merry was attacked.

as to the presence of Sirena at or near the crime scene the night of the attack.[39]

In addition, Bernhard testified that with Detective Cline's notes and the Mahoney Report in hand – both of which contained references to the "Chelsea Square Apartments" and an individual named "Julio" – he might have "put something together" and determined that the "Julio" referenced in Detective Cline's notes and Julio Osorto referenced in the Mahoney Report were one and the same person, namely Sirena.[40]

Bernhard also testified that the Mahoney Report, which recorded the police stop of Julio Osorto with what appeared to be "ketchup stains" on his shirt, provided evidence of possible blood spatter in contradiction to the Commonwealth's expert testimony in support of a closed head wound. He said that he would certainly have "followed the matter up" further.[41] Even so, Bustillo's expert and lay testimony offered at the hearing failed to place blood on

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[39] *Id.* Bernhard further testified that, at trial, the Commonwealth made several references to the fact that the defense called only one witness in support of its position that Sirena, not Bustillo, was the assailant. Had the defense called Officer Mahoney to the stand to testify in support of its theory that Sirena was the actual assailant, Bernhard testified that this corroboration would have "enhanced" the defense's position.

[40] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived at Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998 state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002 hearing, the Commonwealth argued that it made no connection between the two men and did not nknow that "Sirena", a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

[41] Bernhard testified that, absent the Mahoney Report, he purposefully did not question witnesses at trial about Merry's injury or the presence of blood in order to reduce the risk of inflaming the jury.

Sirena or otherwise contradict the Commonwealth's expert testimony. If anything, the evidence was corroborative. In either case, it did not undermine confidence in the jury verdict.

Most importantly, notwithstanding all the information that might have been plumbed from Detective Cline's notes and the Mahoney Report, Bernhard nonetheless testified that he was not certain that either document "would have borne any fruit" or have "changed the outcome" of the trial. In fact, Bernhard testified that, even absent Detective Cline's notes and the Mahoney Report – both of which documented "Sirena" and/or "Julio's" presence at or near the crime scene – he was fully aware of other potential witnesses who could corroborate the existence of Sirena and place Sirena at the scene of the crime, including Jose Armando Amaya.[42] Notwithstanding, Bernhard made a "strategic decision" not to call those witnesses to testify.[43] Bernhard's commendable candor with the Court, especially when coupled with the respect he enjoys from the Court, was instrumental in addressing the fundamental issue presented.

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[42] In his letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney, Todd Sanders, informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats." In the same letter, Sanders also disclosed that "Sirena" was also known as "Julio".

[43] Bernhard testified that he was aware of several witnesses with "dubious credibility" who might have corroborated Sirena's existence and presence at the scene, but that the defense decided against calling such witnesses at trial, in particular Jose Armando Amaya, who had been detained by the authorities. Bernhard testified that he was "instructed by his client" not to talk to Jose Amaya, and that the defense viewed him as an "evidentiary threat," fearing that he would work with the prosecution in exchange for his freedom.

CONCLUSION

The jury, having heard evidence in support of both theories – that the assailant was either Bustillo or Sirena/Senior Julio – believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury.[44]

Upon a complete review of the entire record and a full consideration of the evidence presented on the issue of materiality, the Court finds that Bustillo failed to demonstrate a reasonable probability that the disclosure and use of either Detective Cline's notes and/or the Mahoney Report would have resulted in a different outcome at trial. Even accepting fully evidence that the victim suffered an open head wound and bled at the moment of impact, there is no evidence of any transfer of the victim's blood to the assailant. As a result, the materiality of the undisclosed evidence is simply absent.

In addition, although Detective Cline's notes and the Mahoney Report, if produced prior to trial, might have provided additional avenues for the defense to explore and perhaps bolster its theory that Sirena was the actual assailant, Bernhard conceded that, notwithstanding the nondisclosure of the police notes and report, the defense was aware of other witnesses with knowledge about Sirena, but made a strategic decision not to call them at trial. More importantly, as previously noted, Detective Cline's notes place Bustillo at the scene, a fact plainly at variance with Bustillo's alibi defense. Simply put, nothing was presented that suggests that the result of the original trial might have

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[44] *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is net entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

been different. Evaluating the case in context with the entire record, including the omitted evidence, the Court does not find that the jury would have entertained a reasonable doubt regarding Bustillo's guilt.

For these reasons, the Petition for Habeas Corpus Relief is denied.

An Order is enclosed.

Very truly yours,

/s/

R. Terrence Ney

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON
Respondent.

FINAL ORDER

This matter came before the Court on April 7, 2004 pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence that the Commonwealth failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

For the reasons stated in this Court's opinion letter dated May 4, 2004, which is attached hereto and made a part hereof, the Petition for Habeas Corpus Relief is DENIED.

This Order is FINAL. The Court notes the Petitioner's exceptions to this Order.

ENTERED this 4th day of May, 2004.

/s/

JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

APPENDIX D

CIRCUIT COURT OF FAIRFAX COUNTY

MARIO A. BUSTILLO

v.

GENE M. JOHNSON AND
RONALD J. ANGELONE

September 16, 2003

Case No. (Law) 201879

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* * * * *

BY JUDGE R. TERRENCE NEY

This matter came before the Court pursuant to the Petitioner's Motion to Reconsider the Court's Order of February 21, 2003, whereby the Court denied the Petition for Habeas Corpus Relief.

Facts

On December 10, 1997 John Merry was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Petitioner Mario Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998, Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied by the Court of Appeals of Virginia on April 11, 2000. Bustillo next appealed to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court denied Bustillo's writ of certiorari on June 4, 2001.

Bustillo subsequently filed a Petition for a Writ of Habeas Corpus in the Fairfax Circuit Court claiming, among other things, that the Commonwealth had engaged in several acts of prosecutorial misconduct.[1] Specifically, Bustillo alleged that the Commonwealth:

1. Failed to disclose exculpatory evidence;

2. Engaged in improper and suggestive witness coaching;

3. Threatened and intimidated witnesses in exchange for incriminating testimony;

4. Failed to inform Petitioner of his Vienna Convention rights;

5. Had improper contact with a member of the jury; and

6. Prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required with respect to whether certain evidence, namely a videotape and photograph of an individual named "Sirena" who the defense claimed was responsible for the crime, was in the possession of the Commonwealth and, if so, whether such evidence was exculpatory in nature. The Petition with respect to all other issues raised was denied.

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[1] Petitioner also raised the claim of ineffectiveness of counsel.

[2] The Honorable Henry E. Hudson presided over the August 8, 2002, evidentiary hearing.

An evidentiary hearing on the issues of the videotape and photograph was set for December 5, 2002. Prior to the hearing, this Court granted various discovery requests[3] made by the Petitioner, including:

1. The production of the photograph of "Sirena" by the Commonwealth, if found;

2. The identity of any official of the Fairfax County Police Department, the investigative, or prosecution team who possessed it;

3. Any information possessed by the Fairfax Police Department pertaining to "Sirena," a.k.a. Julio Cesar Osorto Herrera; and

4. The investigative notes of Fairfax County Police Detective Richard J. Cline.

Pursuant to these discovery orders,[4] the Commonwealth produced to counsel for Bustillo a photograph of "Sirena," a copy of Detective Cline's notes of an interview with witness Jose Armando Amaya ("Amaya") dated January 7, 1998,[5] and a copy of Fairfax County Police Officer C. J. Mahoney's investigative report dated December 10, 1997, documenting

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[3] See this Court's Orders dated October 2, 2002, and November 15, 2002.

[4] *Id.*

[5] The notes of Detective Cline contain scattered references to "Sirena" as a person present at the scene. According to Detective Cline's notes dated January 7, 1998, Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. # 3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997, contain the following notation: "Sirena Julio" as being one of the persons present at the scene.

his stop of an individual named Julio Osorto.[6] None of these items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, the Court heard evidence regarding the videotape and photograph of "Sirena," and, in particular, when the Commonwealth obtained such evidence. Finding that neither the videotape nor the photograph were obtained by the Commonwealth during the investigation or prosecution, but rather were obtained post-trial,[7] and, as a result, the Commonwealth had no obligation under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), to turn over the videotape or the photograph to the defense, the Court denied the Petition for a Writ of Habeas Corpus. After hearing evidence, the Court took the matter under advisement. The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on the evidence furnished to the Petitioner by virtue of the discovery orders, in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

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[6] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant. Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[7] In a sworn affidavit dated April 29, 2002, Officer Abraham Gelabert testified that he "found the photograph [of Sirena] after trial." In addition, the evidence before the Court demonstrated that the videotape was initially procured by Petitioner's counsel and was subsequently furnished to the Commonwealth on March 5, 1999, almost one year *after* the trial.

On March 13, 2003, the Court issued a Suspending Order tolling the running of the twenty-one day period in order to conduct a further review of the matter.

Analysis

The issue before the Court is two-fold, namely whether Detective Cline's notes and/or Officer Mahoney's Report constitute exculpatory evidence, and if so, whether the disclosure of such evidence to the defense would have resulted in a different outcome at trial.

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

Evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Id.*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6, 133 L. Ed. 2d 1, 116 S. Ct. 7 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919).

A petitioner has the burden of showing that, when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's

guilt. *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v. Commonwealth*, 232 Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990). Thus, in order for Bustillo to be granted habeas corpus relief, this Court must find that (1) the Mahoney Report and/or Detective Cline's notes constitute exculpatory evidence and (2) the exculpatory evidence is material.

Exculpatory Nature of the Mahoney Report and Detective Cline's Notes

Under *Brady*, exculpatory evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Bagley*, 473 U.S. at 676.

Bustillo argues that prior to the 1998 trial, the Commonwealth's Attorney was well aware of the defense's theory that someone other than Bustillo, namely "Sirena," a.k.a. Julio, had committed the murder of John Merry. Indeed, that was the thrust of the defense case. Bustillo further alleges that not only was the Commonwealth fully aware that "Sirena" also went by the name of "Julio,"[8] but that the Commonwealth was also made aware that "Sirena" and Julio *Osorto* were one and the same person through Officer Mahoney's Report and Detective Cline's interview notes.[9] In addition, the Commonwealth was certainly aware

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[8] In a letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney Todd Sanders disclosed that "Sirena" was also known as "Julio," but did not further identify the latter.

[9] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived in Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998, state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002,

that Merry's blood was found at the scene where he had been assaulted.

Hence, Bustillo argues that Detective Cline's notes, in particular the note equating Julio and Sirena,[10] the note indicating that Sirena held a "cocked" bat,[11] and the note documenting the Chelsea Square Apartment address,[12] and Officer Mahoney's Report, which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission, must be deemed exculpatory. Notwithstanding the Commonwealth's alleged inability to equate "Sirena" with Julio Osorto prior to trial, the Petitioner asserts that the contents of the Mahoney Report and Detective Cline's notes, standing alone, are exculpatory, thereby requiring their disclosure prior to trial.

1. *Julio Osorto – Sirena*

Although not the prime focus of the December 5, 2002 evidentiary hearing, the testimony suggested that the police may not have known prior to trial that "Sirena," the individual referenced by Amaya during his interview with Detective Cline and later identified by others as the assailant,[13] and Julio Osorto, the individual stopped by

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hearing, the Commonwealth argued that it made no connection between the two men and did not know that "Sirena," a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

[10] See Detective Cline's notes of an interview with Nicholas Parada dated December 18, 1998.

[11] See Detective Cline's notes of his interview with Amaya dated January 7, 1998.

[12] See note 9, *supra*.

[13] At the post-trial hearing for a new trial held on July 13, 1998, several witnesses came forward and testified that "Sirena" was the assailant. See Testimony of Giovany Hernandez, Tr. 07/13/98, p. 20; Testimony of Marvin Escobar, Tr. 07/13/98, pp. 40-43; Testimony of Jose Maldonaldo, Tr. 07/13/98, pp. 56, 57.

Officer Mahoney near the crime scene the night Merry was assaulted, were one and the same person. Nor would any reasonable police officer necessarily have made the connection with the facts available to them at the time.[14] Although Amaya referenced an individual named "Julio" during his interview with Detective Cline,[15] nowhere in Detective Cline's notes is "Julio" identified as "Julio Osorto."[16] As such, the Commonwealth testified that it had no reason to suspect or believe prior to trial that either the Mahoney report or those portions of Detective Cline's notes referencing "Julio," standing alone, were exculpatory in nature. The Commonwealth is charged with knowledge of what was contained in *both* reports. *Fitzgerald v. Bass*, 6 Va. App. 38, 50, 366 S.E.2d 615, 622 (1988) (constructive knowledge is attributed to the prosecutor where the information is in possession of the police) (citations omitted).

Turning to the specific evidence, the Commonwealth was certainly aware that Detective Cline conducted several pretrial interviews with various eyewitnesses, as the Commonwealth had Detective Cline testify at trial regarding his interviews with witnesses who had identified

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[14] As the evidence presented at the December 5, 2002, hearing demonstrated, the police did not even have in their possession a photo of "Sirena" until months after the trial. After-discovered evidence does not constitute a basis for habeas relief. *Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (1988).

[15] See *supra*.

[16] Petitioner's contention that reference to the Chelsea Square Apartments in both the Mahoney Report and Detective Cline's notes serve to put the Commonwealth on notice that "Sirena" and Julio Osorto were one and the same person, thus rendering the Mahoney Report and Detective Cline's notes exculpatory, is not dispositive. Two persons listing the same address as their place of residence does not necessarily dictate that such persons are one and the same. Certainly more than one person may occupy a particular residence at the same time.

Bustillo as the assailant. The Commonwealth was also aware of Detective Cline's pretrial interview with Amaya, as the Assistant Commonwealth Attorney summarized the contents of that interview in a letter sent to defense counsel prior to trial.

Similarly, the Commonwealth knew, or is charged with knowing, of the existence of the Mahoney report prior to trial. Yet the Commonwealth offered no explanation as to why Detective Cline's notes or the Mahoney Report were not produced to defense counsel other than the argument that the information contained within Detective Cline's notes and the Mahoney Report was not exculpatory.

The Commonwealth should have known, given the contents of the investigative notes and the police report, that "Sirena-Julio" and Julio Osorto might be one and the same person. Both the Mahoney Report and Detective Cline's notes unquestionably implicate "Sirena," a.k.a. Julio, and "Julio" Osorto, as a possible suspect. The Commonwealth should have made the connection, especially given the defense's insistence that "Sirena"/"Julio" was the assailant.

Moreover, although the Commonwealth disclosed to the defense prior to trial that Sirena was observed at the scene the night Merry was assaulted and that "Sirena's first name appears to be Julio,"[17] it failed to disclose that Amaya also told Detective Cline that he observed Sirena holding a bat in a "cocked" position. This latter piece of information not only makes clear that Sirena was present at the scene, but also implicates Sirena as the actual assailant.

As such, evidence that "Sirena-Julio" was observed approaching the victim and holding a bat in a "cocked"

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[17] In his letter to defense counsel dated March 9, 1998, Sanders informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats."

position and evidence that an individual named Julio Osorto was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing must be deemed exculpatory.

2. *Stop of Julio Osorto*

With respect to the "ketchup stains" observed on Julio Osorto's clothing and referenced in the Mahoney Report, the evidence presented at trial was unclear as to a finding of blood *spatter* at the time Merry was struck. The Commonwealth's uncontradicted expert testimony at trial demonstrated that the fatal blow to the victim's head resulted in a closed head wound.[18] Yet the evidence also showed that there was blood at the scene,[19] including photographic evidence of what appeared to be blood spatter.

Given all of the evidence presented at trial concerning the nature of the victim's injury, which admittedly includes the absence of blood on the victim, the absence of blood on the bats, and the absence of blood on Bustillo, but yet with photographs of the crime scene depicting what appears to be blood spatter, and testimony identifying "Sirena-Julio" as the assailant, the Court finds that the information contained within Mahoney's Report, namely the stopping of

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[18] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98, p. 131 (Michelle Gutierrez); Tr. 3/18/98, p. 222 (Jesse Konstanty); Tr. 3/18/98, p. 264 (Nicholas Parada); Tr. 3/18/98, p. 27 (Valeria Landaeta); Tr. 3/18/98, pp. 100, 111 (Amilcar Amaya); Tr. 3/18/98, p. 142 (Christina Hondoy). In addition, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98, p. 193.

[19] Dr. Frances Field further testified that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear then out of the ear canal. Tr. 3/17/98, p. 193.

a "Julio" near the crime scene at the time of the incident with red stains on his clothes, is exculpatory in nature warranting its production to the defense prior to trial.

Materiality of the Mahoney Report and Detective Cline's Notes

Notwithstanding the exculpatory nature of Detective Cline's notes and the Mahoney Report, a new trial is not automatically required whenever * * * "a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States*, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S. Ct. 763 (1972). In other words, the Petitioner still must establish the materiality of such evidence.

As previously stated, implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. *Bagley*, 473 U.S. at 676. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528, citing *United States v. Agurs*, 427 U.S. at 109-10. Rather, evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed, the result of the trial would have been different. *Id.*, 255 Va. at 464, 499 S.E. at 519, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In further defining the materiality standard, the *Strickland* Court explained that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have

had a reasonable doubt respecting guilt." 466 U.S. at 695. In determining whether Bustillo has established a "reasonable probability" that disclosure of Detective Cline's notes and/or the Mahoney Report to the jury would have [a]ffected the outcome of the trial, the Court considers the exculpatory evidence in context with the existing record.

First, although there is no manifest connection between the "Julio" stopped by Officer Mahoney and the assault of John Merry, Bustillo has shown that Julio Osorto was present in the general vicinity of where the crime occurred, near the time of the assault, with what appeared to be "ketchup stains" on his shirt and pants. Additionally, both Officer Mahoney's notes and Detective Cline's notes reference the Chelsea Square Apartments with respect to "Julio's" reported residence.

Second, in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a "Sirena," the jury would still have to disregard the substantial evidence presented at Bustillo's criminal trial that Bustillo was the assailant.

For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrrez testified that both "Sirena" and Bustillo were present at the crime scene[20] and that Bustillo was the one who took a bat and struck the victim.[21] Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant.[22]

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[20] Testimony of Michele Gutierrez, Tr. 03/17/1998, p. 129.

[21] *Id.*, Tr. 03/17/98, p. 131.

[22] Testimony of Jesse Konstanty, Tr. 3/17/98, p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98, p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98, p. 36.

In addition, Detective Cline testified about his pre-trial interview with Nicholas Parada ("Parada"),[23] who was present at the scene the night of the assault. Parada told Detective Cline that he observed "[Bustillo] standing there with a bat and the victim had fallen to the ground."[24] Detective Cline further testified that when he interviewed Parada on December 18, 1997, Parada told him that he actually saw Bustillo "swinging the bat . . . he saw the bat swinging and he saw the person drop to the floor or to the ground. But [Parada] did indicate that he didn't actually see him strike the victim [although] he did see him swinging the bat in that direction." Testimony of Detective Cline, Tr. 03/18/98, p. 52. Detective Cline also stated that among all the people he interviewed at the crime scene the evening of the assault, "Mario" was the only one everybody identified as having swung the bat. Tr. 03/18/98, p. 53.

Petitioner points out that Nicholas Parada testified at trial that, although he did not see the assault, he did see Bustillo swing the bat in the direction of the victim. Tr. 03/17/98, p. 271. Petitioner contends that this observation recounts precisely the same act as that reported by Amaya in his interview with Detective Cline on January 7, 1998, which Amaya attributed to Sirena.

The jury, however, also heard testimony during the trial implicating "Sirena" as the assailant. Testifying for the defense, Amilcar Amaya[25] stated that he was outside the Popeye's when he saw "Senior Julio"[26] *also known as*

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[23] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[24] Testimony of Detective Cline, Tr. 03/18/98, p. 51.

[25] Amilcar Amaya is not the same person as Jose Armando Amaya referred to in Detective Cline's notes dated January 7, 1998.

[26] Amilcar Amaya indicated that he did not know "Julio's" last name.

"*Sirena*" take a bat and strike the victim.[27] Esmirna Hondoy also testified that she was at Popeye's and witnessed the assault. Although she could not identify the assailant, she testified that Bustillo was *not* the one who attacked the victim.[28]

The jury, having heard evidence in support of both theories, that the assailant was either Bustillo or Sirena/Senior Julio, believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury. *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

Notwithstanding, the Court, in addressing the materiality issue on habeas review, must consider what defense counsel could have done or might have done differently had Detective Cline's notes and/or the Mahoney Report been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury. *Evans-Smith v. Taylor*, 30 Va. Cir. 116 (Loudoun County, 1993).

With respect to the first aspect, it is reasonable to assume that, had the defense known about Amaya's statement

---

[27] Testimony of Amilcar Amaya, Tr. 03/18/98, p. 99, 100-01, 110-11.

[28] Testimony of Esmirna Hondoy, Tr. 03/18/98, p. 142-43). Officer Bayliss, who was also called to testify for the defendant and was the first officer to arrive at the Popeye's the night of the crime, stated that when he spoke with Hondoy that night, she told him that the assailant was "Mario" and that Mario took the bat from another individual named Lisandro Parada. Testimony of Officer Bayliss, Tr. 03/18/98, p. 185. Detective Cline gave similar testimony in rebuttal. Testimony of Detective Cline, Tr. 03/18/98, p. 189.

to Detective Cline regarding his observation of Sirena's holding a "cocked bat" and the police stop of Julio Osorto on the night of the assault, then the defense would have sought to have had Amaya, Officer Mahoney, and Julio Osorto testify on its behalf. Alternatively, in the event that such witnesses were unavailable to testify, defense counsel may have sought to have had Detective Cline's notes and/or the Mahoney Report introduced into evidence at trial to further support the defense theory that Julio/Sirena, not Bustillo, was the actual assailant. The Court does not opine on the admissibility of either Detective Cline's notes or the Mahoney Report and in particular whether such reports, if deemed hearsay, would fall under any of the exceptions to the hearsay rule.

Furthermore, with respect to the "ketchup stains" referenced in the Mahoney Report, the trial record is devoid of evidence that the victim suffered an open-head wound or testimony as to blood spatter, save the photographic evidence of what appeared to be blood at the scene. But Officer Mahoney's observations of "what appeared to ketchup on [Julio Osorto's] pant legs and a little on his shirt," when coupled with the photographs, tend to belie the evidence presented in support of the Commonwealth's closed head wound theory. With the Mahoney Report in hand, the defense might have further developed its theory of the case, namely, that the victim suffered an open head wound at the moment of impact and that the wound resulted in the transfer of the victim's blood to the assailant.

Third, the Court has to consider the effect that Detective Cline's notes, in particular Amaya's statement, and the Mahoney Report would have had on the result of the trial had such evidence been presented to the jury. While certainly arguable either way, additional corroborating witnesses for the defense might have bolstered its theory

that Sirena was the actual assailant.[29] In addition, evidence of what may have been blood on Julio Osorto might have cast doubt not only on the Commonwealth's closed head wound theory, but also on Bustillo's guilt.

Conclusion

Upon review of the entire record and a full consideration of the issues, the Court finds that the information contained within Officer Mahoney's Report and the information contained within Detective Cline's notes, documenting Julio Osorto/Sirena's presence and actions at the crime scene, are exculpatory and thus should have been disclosed to the defense prior to trial.

As to whether the notes of Detective Cline and Officer Mahoney show a reasonable probability that, had such evidence been disclosed to the defense, the result of the criminal trial might have been different, the Court is unwilling at this time to set aside the verdict and order a new trial absent further evidence as to such a probability. In order to properly determine whether disclosure of the police investigative notes and report to the jury would have affected the outcome of trial, the Court finds that a limited hearing on the issue of materiality is warranted in determining whether Bustillo has established that he is entitled to habeas relief.

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[29] As the Petitioner points out, Amaya's testimony certainly would not have been cumulative, as there was only one other defense witness (Amilcar Amaya) to inculpate Sirena as the assailant. In addition, the Commonwealth referred more than once in closing argument to the fact that the defense produced only one eyewitness to name the assailant in comparison to the several witnesses identifying Bustillo as the assailant. The Petitioner argues that Amilcar Amaya's testimony was ultimately rejected by the jury because of the lack of any corroborating witnesses.

The Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending further proceedings.

Order

This matter came before the Court pursuant to Petitioner's Motion for Reconsideration of this Court's February 21, 2003, Order, whereby the Court denied the Petition for a Writ of Habeas Corpus subsequent to a limited evidentiary hearing held on December 5, 2002. On March 13, 2003, the Court entered a Suspending Order tolling the running of the twenty-one day period to conduct a further review of the matter. For the reasons stated in this Court's opinion letter dated September 16, 2003, which is attached hereto and made a part hereof, the Petitioner's Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending a limited evidentiary hearing on the issue of materiality.

APPENDIX E

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

FINAL ORDER

THIS CAUSE is before this Court on Petitioner's Application for a Writ of Habeas Corpus. Upon consideration of that petition, the motion to dismiss filed by the respondent and the authorities cited therein, the Court, by memorandum opinion and order dated August 8, 2002, ordered an evidentiary hearing limited to the question whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It granted respondent's motion to dismiss all remaining claims.

After mature consideration of the foregoing and of the evidence presented at the evidentiary hearing on December 5, 2002, and a review of the record in the criminal case of *Commonwealth v. Mario Bustillo*, Case No. CR-93337, which is hereby made a part of the record in this habeas corpus matter, the Court finds for the reasons stated to the record at the evidentiary hearing that the

petitioner is not entitled to the relief sought. The Court concludes that the Commonwealth did not violate the petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and grants respondent's motion to strike the evidence.

This Court incorporates by reference the August 8, 2002 memorandum opinion and order and its order of October 3, 2002 amending the memorandum opinion.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to petitioner, John C. Kiyonaga, Esq., the respondent, and H. Elizabeth Shaffer, Assistant Attorney General, and Stephen R. McCullough, Assistant Attorney General.

Entered this 21 day of February, 2003.

/s/

R. Terrence Ney, Judge

APPENDIX F

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

MEMORANDUM OPINION

This case is before the Court on Petitioner's Application for a Writ of Habeas Corpus pursuant to § 8.01-654 *et seq.* of the Code of Virginia.

On January 20, 1998, a Fairfax County grand jury indicted Mario Bustillo (hereinafter Petitioner) for first degree murder. On March 20, 1998, a jury found Petitioner guilty of first degree murder and sentenced him to thirty (30) years in the penitentiary. On June 12, 1998, Petitioner made a motion to set aside the verdict. After an evidentiary hearing, Judge Gerald Bruce Lee denied Petitioner's Motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied on April 11, 2000. Petitioner then appealed the case to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court

denied Petitioner's writ of certiorari on June 4, 2001. This Petition follows.

Petitioner claims that the Commonwealth engaged in several acts of prosecutorial misconduct. Petitioner also contends that his trial counsel was so ineffective as to amount to a violation of the protections afforded to him by the United States Constitution.

I. FACTS OF THE UNDERLYING CONVICTION AND APPEAL

The evidence in the underlying criminal action revealed that on or about the night of December 10, 1997, James Merry was struck in the head by another young man with a baseball bat in the parking lot of a Popeye's Restaurant in Springfield, Virginia. Merry died several days later. The Petitioner was later arrested and charged with murder based on the statements of several individuals who witnessed the incident.

At trial, each witness identified Petitioner as the assailant based on their past knowledge of him from the local high school and their recollection of the assailant's clothes that night--a red sweater or jacket. Additionally, the Commonwealth produced witnesses linking Petitioner to a group of Hispanic men who allegedly belonged to a gang called the "Commerce Street Locos."

Petitioner's evidence consisted of six witnesses, including a female who was standing next to the decedent when he was struck. She testified that Petitioner was not the assailant. Additional defense witnesses corroborated her testimony and further indicated that another individual named "Sirena" was responsible for the assault.

II. PROSECUTORIAL MISCONDUCT

Petitioner's first claim is prosecutorial misconduct. He specifically alleges the following:

(1) The Commonwealth failed to disclose exculpatory evidence;

(2) The Commonwealth engaged in improper and suggestive witness coaching;

(3) The Commonwealth threatened and intimidated witnesses in exchange for incriminating testimony;

(4) The Commonwealth failed to inform Petitioner of his Vienna Convention rights;

(5) The Fairfax County Police had improper contact with a member of the jury; and

(6) The Commonwealth prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

III. LEGAL ANALYSIS

Petitioner alleges in essence that the Commonwealth engaged in a course of prosecutorial misconduct consciously calculated to convict the wrong defendant. However, many of Petitioner's prosecutorial misconduct claims are procedurally barred. The seminal case establishing the standard of review in a habeas corpus proceeding states that a habeas petition is not an appellate substitute. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975). When claims are available or are adjudicated at trial or on appeal, a Petitioner may not raise the issues again in a habeas corpus petition. *Id.* at 29-30.

Specifically, Petitioner contends that the Commonwealth, including the Fairfax County Police Department, wrongly suppressed exculpatory evidence and engaged in unlawful and prejudicial conduct. However, Virginia law precludes Petitioner from litigating or relitigating claims that could have been raised and argued at trial or during the appellate process. *See Slayton*, 215 Va. at 29-30. In

addition, "absent a change of circumstances, previous determination of the issues by . . . state . . . courts will be conclusive" in a habeas review. *Hawks v. Cox*, 211 Va. 91, 95 (1970). Moreover, prisoners are denied further relief if they state no new claims or try to reengage allegations that were resolved against them in the appellate process. *Id.*

Petitioner also urges that numerous witness recantations, evidence of alleged perjured testimony, and recently altered witness recollections be admitted to prove his innocence. However, the existence of newly discovered evidence arguably relevant to guilt is not a ground for habeas relief, and may not be considered by the Court. *See Fitzgerald v. Bass*, 6 Va. App. 38, 46 (1988) (witness recantations not a basis for relief).

A. Exculpatory Evidence Claim

The standard of review applicable to allegations of wrongful suppression of exculpatory evidence is rooted in the case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). If evidence favorable to a defendant is material to the defendant's guilt, regardless of the prosecution's good or bad faith intention, withholding of that evidence potentially violates due process. *Id.* at 87. The Supreme Court further crafted a "materiality standard" for courts to apply in analyzing claims of allegedly withheld exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667 (1985). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. To determine the amount of potential prejudice that the withheld evidence caused during trial, courts in Virginia assess the reasonable probability of a different trial result, taking into account the difficulties of trying to envision how the defense would have proceeded at trial had the evidence

been disclosed. *See Robinson v. Commonwealth*, 231 Va. 142, 152 (1986).

Petitioner claims that the exculpatory evidence the Commonwealth allegedly withheld at trial and during discovery would have created reasonable doubt with respect to the identity of the assailant. Petitioner's burden is to demonstrate that, in light of the entire record, the omitted evidence would have provided the jury with a basis for reasonable doubt as to his guilt. *See Soering v. Deeds*, 255 Va. 457, 464 (1998). "Evidence proffered by an accused that merely suggests a third party *may* have committed the crime charged is inadmissible; only when proffered evidence tends *clearly* to point to some other person as the guilty party will such proof be admitted." *Id.* (citing *Karnes v. Commonwealth*, 125 Va. 758, 766 (1919) (emphasis included).

The record reveals that defense counsel targeted another man named "Sirena," whose real name is Julio Cesar Osorto, as the true assailant, but failed to produce any probative evidence of this man's existence. Petitioner asserts that the Commonwealth possessed a photograph and videotape of Osorto. The videotape allegedly shows Orsorto confessing to the crime following his flight to Honduras, thus linking him, at least, to the scene of the crime. The record is unclear as to if and when the Commonwealth possessed the alleged photograph and videotape.

Petitioner's claim that the Commonwealth withheld the photo and videotape may have merit if the Commonwealth had the items in its possession and failed to disclose the evidence before or during trial. Respondent's assertion that the *Brady* standard does not apply if the evidence in dispute was available to defendant from other sources fails in this instance if Petitioner lacked knowledge of its existence at the time of trial. *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787

F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852 (1986)). In that case, Petitioner would not have had such a claim available during trial or his series of appeals that followed.

The record appears to support Petitioner's claim that he had no knowledge of the pictures or videotape at trial, thus making them unavailable through any means other than disclosure by the Commonwealth. Assuming, *arguendo*, that the Commonwealth did have such evidence at the time of trial, a colorable argument exists that both the *Brady* and *Bagley* standards may be satisfied and that there is a serious question as to reasonable doubt under *Soering*. Therefore, it is the Court's opinion that an evidentiary hearing is necessary to determine whether the Commonwealth possessed the photo and videotape, and whether such possession was at a time in which disclosure would have been beneficial to Petitioner.

While Petitioner's first claim concerning exculpatory evidence warrants further examination, his remaining claims of prosecutorial misconduct must be dismissed. In his petition, Petitioner makes numerous claims that the Commonwealth improperly coached witnesses; threatened witnesses with deportation and prosecution; tampered with the jury; failed to inform Petitioner of his Vienna Convention rights; and wrongly promoted the unsubstantiated claim that Petitioner was a "gang" member in order to inflame the jury. Despite the breadth and details of these claims, they are all procedurally barred by the *Slayton* and *Hawks* holdings. Because these claims were available to Petitioner during trial and through the appellate process, the Court does not reach the merits of those claims in the instant proceeding.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next challenges the effectiveness of the assistance of his trial counsel. His allegations consist of the following:

(1) His attorney failed to produce exculpatory witnesses;

(2) His attorney failed to timely object to certain testimony offered by the Commonwealth;

(3) His attorney failed to object to the Commonwealth's continued references to Petitioner's gang affiliation;

(4) His attorney failed to inform him of his Vienna Convention rights to meet with the Honduran Consulate; and

(5) His attorney's relationship with a police officer assigned to the case presented a conflict of interest.

V. LEGAL ANALYSIS

The standard two-prong analysis for analyzing inadequate assistance of counsel claims in habeas corpus petitions was set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a Petitioner must show that trial counsel made errors so egregious as to implicate Petitioner's fundamental Sixth Amendment rights. Secondly, Petitioner must show that counsel's errors prejudiced the defense so seriously that counsel's performance compromised Petitioner's right to a fair trial. *Strickland*, 466 U.S. at 687; *Curo v. Becker*, 254 Va. 486 (1997). Petitioners must overcome high hurdles in challenging trial counsel's trial tactics because great deference is given to counsel's judgment and decisions. *Strickland*, 466 U.S. at 690. Attorneys are presumed to have made decisions and acted with reasonable professional judgment. *Id.* at 690-91.

In a collateral attack on a conviction, "a prisoner not only has the burden of proving ineffective assistance of counsel, but also must prove actual prejudice as a result." *Stokes v. Warden*, 226 Va. 111, 118 (1983); *accord Strickland*, 466 U.S. at 687. In order to establish prejudice, there must be a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

In applying the *Strickland* test, a Petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In determining the existence of prejudice, the court must consider the totality of the evidence presented at the criminal trial. *Id.* at 695; *accord Strickler v. Murray*, 249 Va. 120, 128, *cert. denied*, 516 U.S. 850 (1995).

It is obvious that trial counsel in the immediate case maintained a consistent, yet unsuccessful strategy. However, "effective" representation is not synonymous with "successful" representation. *See Peyton v. Ellsyon*, 207 Va. 423, 426-27 (1966). The question is whether trial counsel's failure to produce certain witnesses, note timely objections, counter evidence of gang affiliation, or raise the alleged conflict effectively denied Petitioner his constitutional right to assistance of counsel. A review of the record in its entirety revealed that trial counsel's presentation of Petitioner's case did not fall below the acceptable level of representation of a defendant. Moreover, the evidence presented by the Commonwealth demonstrated a convincing case of Petitioner's guilt.

A. Exculpatory Witnesses

Petitioner contends that his trial counsel failed to adduce testimony from witnesses, perceived to be exculpatory, that in Petitioner's view would have changed the trial's outcome. Counsel is not ineffective for failing to call an unfavorable witness that may weaken, rather than strengthen, a defense. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

The record indicates that trial counsel did not call certain witnesses because Petitioner's father instructed him not to, or the witnesses had provided false statements to police. "[W]hen defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. It appears that counsel's trial strategy was to exclude the witnesses in question because in his opinion they would weaken the defense. Petitioner cannot prove prejudice if counsel declined to call a witness whose credibility was subject to impeachment. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

B. Objections

Petitioner further argues that counsel was ineffective for failing to object to portions of the Commonwealth's evidence. Specifically, Petitioner claims that trial counsel should have objected to the medical examiner's testimony about cause of death. However, the record indicates that trial counsel maintained a consistent strategy not to object to testimony that would make it appear he was trying to hide something from the jury. Such reasonable, strategic choices are "virtually unchallengeable". *Strickland*, 466 U.S. at 690. Moreover, it is unlikely that counsel's objection to the medical examiner's opinion would have been sustained.

C. "Gang Taint"

Petitioner argues that trial counsel failed to disassociate Petitioner from the taint of gang affiliation and that his questions tended to promote the association. The record reflects that counsel's strategy in navigating the gang overtones in the case was to promote the victim's gang relationship. Petitioner cannot now question this tactic in hindsight, for courts have been reluctant to second-guess trial lawyers' tactics. *See Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977). The *Strickland* test requires the reasonable probability that counsel's errors caused an unreliable trial outcome. *See Strickland*, 466 U.S. at 687. The Petitioner has not proven such probability.

D. Vienna Convention Rights

Petitioner further assails his trial counsel for not advising him of his right to meet with the Honduran consul under the Vienna Convention on Consular Relations. Assuming, without deciding, that such rights exist under the facts of this case, the Court's holding in *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975) bars this claim because Petitioner had ample time to raise the issue at trial or on appeal.

E. Conflict of Interest

Lastly, Petitioner claims trial counsel allowed a conflict of interest to compromise his representation of Petitioner in violation of Petitioner's Sixth Amendment rights. Petitioner claims that one of the police officers in the case had previously recommended trial counsel's legal services to other members of the community. Petitioner, though, fails to show the alleged conflict of interest actually had an adverse effect on counsel's performance, particularly because the record reflects that counsel had no knowledge of the referrals. *See Mickens v. Taylor*, 122 S. Ct. 1237, 1243-44 (2002) (holding that a defendant must establish that an alleged conflict of interest adversely affected his

counsel's trial performance to demonstrate a Sixth Amendment violation).

VI. CONCLUSION

In the final analysis, the Court is of the opinion that only one of Petitioner's claims warrants further review. The record is unclear whether the photograph or videotape of Osorto's statement was in the Commonwealth's possession in time to be of value to Petitioner at his trial or for an immediate post-trial proceeding.

If the photograph or video were available, the Court must further determine whether it was in fact exculpatory. These issues will require a limited evidentiary hearing. Therefore, Petitioner's Petition with respect to this issue is granted.

The remaining prosecutorial misconduct and ineffective assistance of counsel claims are barred by Virginia habeas corpus law. Accordingly, the Court grants Respondent's Motion to Dismiss with respect to those remaining claims.

Entered this 8 day of August 2002.

/s/

Henry E. Hudson, Judge

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner's Application for a Writ of Habeas Corpus. The Court finds that a limited evidentiary hearing is required with respect to whether certain evidence was in the possession of the Commonwealth, and if so, whether that evidence was exculpatory to Petitioner. It is therefore

ORDERED that the Petition is GRANTED only on the issues of determining whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It is further

ORDERED that the Petition with respect to all remaining issues is DENIED.

Entered this 8 day of August, 2002.

/s/
Henry E. Hudson, Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

APPENDIX H

CONSTITUTIONAL AND TREATY PROVISIONS

1. The Supremacy Clause of The Constitution of the United States of America, Art. VI, cl. 2, provides in relevant part:

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

2. The Due Process Clause of the Fifth Amendment to The Constitution of the United States of America provides in relevant part:

* * * * *

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

* * * * *

3. Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, provides in relevant part:

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national

who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

4. The Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, art. I, 21 U.S.T. 325, provides in relevant part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

(2)

No. 05-51

FILED
SEP 23 2005
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SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, in his official capacity as Director of the Virginia Department of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, create judicially enforceable individual rights?

2. Assuming that the Vienna Convention does create judicially enforceable individual rights, does it also require a state court to ignore its own rules of procedure?

3. Did the state courts properly decide the Petitioner's routine claims under *Brady v. Maryland*, 373 U.S. 83 (1963)?

   a. Does a well-established state court rule – the failure to timely file transcripts – constitute an adequate and independent state procedural bar?

   b. Assuming that there is no adequate and independent state procedural bar, was the prosecution's failure to disclose certain documents material?

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BRIEF IN OPPOSITION

The Respondent, Gene M. Johnson, in his official capacity as the Director of the Virginia Department of Corrections ("the Director"), through his counsel, Virginia Attorney General Judith Williams Jagdmann, and pursuant to this Court's Order of July 25, 2005 directing that a response be filed, responds to the Petition for a Writ of Certiorari.[1]

INTRODUCTION

The International Court of Justice has held that the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, creates judicially enforceable individual rights and that American courts must ignore their own procedural rules when enforcing those rights. *See Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128 (Mar. 31); *LaGrand Case (Federal Republic of Germany v. United States)*, 2001 I.C.J. 466 (June 27). Although this Court granted certiorari to consider the implications of these decisions, *Medellin v. Dretke*, 125 S. Ct. 686 (2004), new developments in that case prompted the Court to dismiss the Writ as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088, 2092 (2005).

Although this Petition presents questions similar to those left unresolved in *Medellin*, it presents an inappropriate vehicle to resolve the issues. First, the rule of

[1] On August 10, 2005, this Court extended the time for such filing to and including September 23, 2005.

Teague v. Lane, 489 U.S. 288, 316 (1989), precludes this Court from considering the issue. Second, in deciding the Vienna Convention issue, the lower court did not reach any federal question, but relied exclusively on state law. Third, the failure to follow the Vienna Convention was harmless error. Finally, while the Petition does raise various routine *Brady* claims, those claims are barred by an adequate and independent state ground and are unworthy of this Court's attention.

STATEMENT OF THE CASE

1. Background

On the evening of December 10, 1997, at about 7:30 p.m., James Merry and three friends, Jesse Konstanty, Michelle Gutierrez, and Valeria Landaeta were eating dinner inside a Popeye's restaurant in Springfield, Virginia. Tr. 03/17/98 at 100, 125, 127.[2] Ms. Gutierrez looked out into the parking lot and saw three cars parking. The cars' occupants started pointing at the group. Ms. Gutierrez warned her friends not to leave the restaurant because she thought something was going to happen. Tr. 03/17/98 at 127. Ms. Gutierrez knew these men were members of the Commerce Street Locos, a gang. Tr. 03/17/98 at 148.

[2] Throughout this brief, references to the trial transcript are designated as "Tr. (date of trial) at ___", references to the trial record are designated as "T.R. at ___", references to the habeas record are designated as "H.R. at ___", and references to the Petitioner's Appendix are designated as "*Pet. App.* at ___". Confusingly, some of the habeas exhibits were filed with the trial record, explaining the "T.R." citation.

Shortly thereafter, the men, around fifteen of them, entered the restaurant. Ms. Gutierrez recognized many of these men, including the petitioner, Mario Bustillo, and an individual known to her as "Sirena." Tr. 03/17/98 at 129-30. She believed the men were drunk because their speech was slurred. They threatened Mr. Merry and Mr. Konstanty in Spanish, accusing them of fighting with members of their gang on another occasion. Ms. Gutierrez said they were mistaken, that neither Mr. Merry nor Mr. Konstanty was Hispanic or understood anything they were saying. The group insisted, "[n]o . . . it was him, it was him in the red car." Tr. 03/17/98 at 128. She insisted that they were mistaken because "he drives a blue car." The group looked at each other, after which the petitioner shook Mr. Merry's hand, and said, in Spanish, "Oh. I'm sorry. We got you mistaken." Tr. 03/17/98 at 129. One of them said "We have no problems with you. It's your friend that we want to get an opportunity to meet." Tr. 03/17/98 at 221. They left, and Ms. Gutierrez, who was still nervous, warned her friends to stay in the restaurant. Tr. 03/17/98, at 130.

Nevertheless, Mr. Merry went outside to smoke a cigarette. Meanwhile, the gang members were walking around the parking lot. Tr. 03/17/98 at 131, 239-40. Ms. Gutierrez then saw Mr. Merry lean against a sign and light a cigarette. Tr. 03/17/98 at 157. He appeared to be talking to Cristina Hondoy, who was facing him. Tr. 03/17/98 at 163, 250. An assailant ran up, swung a baseball bat, hit Mr. Merry on the left side of his head, and ran

away. Tr. 03/17/98 at 131, 181. Because of this attack, Mr. Merry died.[3]

The police arrived soon after the attack and questioned a number of individuals. That night police recovered two baseball bats at the scene, fifty to seventy-five yards east of the Popeye's restaurant. Tr. 03/17/98 at 116. Neither bat had blood on it. Tr. 03/17/98 at 108. Mr. Bustillo was the only perpetrator identified to the police. Tr. 03/18/98 at 53, 67-69. The police subsequently arrested Mr. Bustillo and charged him with the murder of Mr. Merry. Although Mr. Bustillo is a citizen of Honduras, the arresting officers failed to advise him that he could contact Honduran consular officials.

2. Mr. Bustillo's Trial

a. Virginia's Case Against Mr. Bustillo

Mr. Bustillo, with the assistance of retained counsel, faced a jury trial on March 17-20, 1998, for the murder of Mr. Merry. At trial, Mr. Konstanty, Ms. Gutierrez, and Ms. Landaeta testified that Mr. Bustillo was the assailant.[4]

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[3] The blow fractured Mr. Merry's skull in several places. Tr. 03/17/98 at 205. Dr. Frances Field, the medical examiner who examined Mr. Merry's body, testified that such an injury would cause blood to "seep" into the inner ear and then out of the ear canal. Tr. 03/17/98 at 193. Following the attack, Mr. Merry's brain continued to swell, shutting down his other organs, and he eventually died after life supports were discontinued. Tr. 03/17/98 at 207.

[4] Moreover, a member of Mr. Bustillo's gang, Nicolas Parada, told the police he had seen Mr. Bustillo strike Mr. Merry with the bat. Tr. 03/17/98 at 265; Tr. 03/18/98 at 51-52. At trial, however, he provided a different version, saying he saw the "kid had fallen down and . . . that Jesse was chasing Mario [Bustillo] and Julio Sirena." Tr. 03/17/98 at

(Continued on following page)

Tr. 03/17/98 at 131, 138. Prior to trial, Ms. Gutierrez and Mr. Konstanty, separately and without hesitation, selected the petitioner's photograph from a spread Detective Richard Cline showed them. Tr. 03/18/98 at 39, 41-42; Tr. 03/18/98 at 21-22, 28. Ms. Landaeta went to the same school as Mr. Bustillo, where she would see him every day because she shared a class with him. Tr. 03/18/98 at 20-21. She also knew that Mr. Bustillo lived approximately five minutes from the Popeye's restaurant, and she, Ms. Gutierrez, and another friend showed the police to his home. Tr. 03/18/98 at 22-23, 43, 67.

b. Mr. Bustillo's Defense

Mr. Bustillo claimed that a gang member nicknamed Sirena was responsible for the attack. Amilcar Amaya, who had been a member of Mr. Bustillo's gang, said he observed "Señor Julio," a/k/a Sirena, walk towards the area where Mr. Merry was standing. Tr. 03/18/98 at 90, 98-99. According to Mr. Amaya, when Sirena was close, he moved to the right, took out a bat, and hit Mr. Merry on the side of the head. Tr. 03/18/98 at 100, 110. Mr. Amaya testified that he did not see Mr. Bustillo there that evening at all, either inside or outside the restaurant, and stated that he was the one who shook hands with Mr. Merry inside the restaurant. Tr. 03/18/98 at 101.

At the time of trial, police did not know Sirena's identity. Tr. 03/18/98 at 70. He was referred to by one witness as having a first name "Julio." Police spoke with several individuals but no one could provide them with a

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263. He could no longer recall whether Mr. Bustillo had a bat. Tr. 03/17/98 at 264.

last name or any information about Sirena. Tr. 03/08/98 at 70.[5] Moreover, although several individuals had a clear view of the incident, not a *single* eyewitness told the police that Sirena was the one who struck the fatal blow. Tr. 03/18/98 at 53, 67-68, 69.

At the close of the case, the jury deliberated and found Mr. Bustillo guilty of the murder of Mr. Merry.

c. Post-Trial Motions

Mr. Bustillo, with a new retained attorney, filed a motion to set aside the jury's verdict. T.R. at 150-61. He supplemented this motion with an addendum. T.R. at 162-68. In that motion, he alleged: (1) insufficient evidence; (2) newly discovered evidence through "new" witnesses (Giovany Hernandez, Marvin Escobar and Jose Maldonado), and "false trial testimony" (Valeria Landaeta); (3) "illegally obtained evidence" in the form of alleged threats by Detective Cline to Nicholas Parada, and (4) a *Brady* violation, for the alleged nondisclosure of an allegedly exculpatory statement from Yahayra Quierolo.

The trial court held a hearing on the motion. Among other witnesses, Ms. Landaeta testified to the extensive pressure placed on her by a gang member to recant her testimony. Tr. 07/13/98 at 180-82, 211. The trial court denied the motion, finding that the allegations of police misconduct were not credible. Tr. 07/13/98 at 246-69. Mr. Bustillo then filed a renewed motion to set aside the

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[5] Sirena is referred to variously as Julio Sorto, Tr. 03/18/98 at 70; Ostorto, Julio, H.R. 402-03; Osorto, Julio C., H.R. 366-67; and Julio Cesar Osorto Herrera, T.R. 381, 390.

verdict, claiming still more newly discovered evidence and further allegations of police misconduct. T.R. 209-14. The trial court again denied the motion. T.R. 234-39.

3. The Appeals

Mr. Bustillo then appealed his conviction with the assistance of retained counsel. Virginia's intermediate appellate court, the Court of Appeals, affirmed. *See Bustillo v. Virginia*, 2000 WL 365930, April 11, 2000 (Va. App. 2000) (unpublished). The Supreme Court of Virginia affirmed the decision without comment. *See Bustillo v. Virginia*, No. 001110 (Va. 2000) (unpublished). This Court also declined to review the decision. *See Bustillo v. Virginia*, 532 U.S. 1072 (2001).

4. State Habeas Corpus Petition

Finally, Mr. Bustillo, again with the assistance of retained counsel, filed a petition for a writ of habeas corpus in the trial court.[6] He made two types of claims. First, he alleged his rights under the Vienna Convention on Consular Relations (Vienna Convention) were violated.

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[6] As an exhibit to his habeas corpus petition, Mr. Bustillo produced a videotape, obtained by Commerce Street Locos Gang member Reniery Alexis Espinoza Maradiaga, a/k/a Selwin Santa Maria. Mr. Maradiaga claims he surreptitiously videotaped "Sirena." Hab. Pet. Ex. 9; Hab. Pet. Ex. 4. This conversation took place in Honduras. Hab. Pet. Ex. 9B. In the videotape, Sirena says he was the one who struck the blow that killed James Merry. Hab. Pet. Ex. 9, p. 4. After some prodding, Sirena recalled that he was wearing a red sweater. Hab. Pet. Ex. 9, p. 3, 7. Mr. Maradiaga edited the tape so Sirena's location would not be determined. Hab. Pet. Ex. 9B. This "confession" was taped in late November of 1998, and affidavits to authenticate it were sworn in January of 1999. Hab. Pet. Ex. 9B.

He also alleged that his attorney was ineffective in a number of particulars and the prosecution and police had engaged in numerous acts of misconduct. H.R. at 1-63. In one of his claims of prosecutorial misconduct, Mr. Bustillo asserted that the prosecution possessed and withheld a photograph of "Sirena." H.R. at 39-40.

a. The Vienna Convention Claim

On May 3, 2002, Mr. Bustillo filed an "addendum" seeking to "augment" his habeas petition. He alleged that the Vienna Convention obligation was "absolute and non-delegable" but argued, in the alternative, that his retained counsel was ineffective for failing to advise Mr. Bustillo of his right to consult with the Honduran consulate. H.R. at 158. He later filed a motion for leave to amend his petition on this ground. H.R. at 254. The Director objected on the ground that this amendment did not "relate back" to the original claims and was barred by the statute of limitations. *Virginia Code* § 8.01-654(A)(2). H.R. at 272.

On August 8, 2002, the trial court dismissed the Vienna Convention claim based on *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974), holding that the "[p]etitioner had ample time to raise the issue at trial or on appeal." *Pet. App.* at 47. The order did not address the "addendum" or requested amendment seeking to raise a claim of ineffective assistance of counsel for failing to inform Mr. Bustillo of his Vienna Convention rights. The Director filed a motion for clarification, with an affidavit from trial counsel, asking the court to rule on this claim. (H.R. 310). Mr. Bustillo's trial counsel explained in his affidavit that he was the son of a diplomat and was aware of the Vienna Convention. He deliberately did not advise his client of the Vienna Convention because he did not

want his client to speak to anyone for fear that these conversations might then be used against him at trial. H.R. at 318-19. The trial court entered an order amending the memorandum opinion on October 11, 2002, holding that the requested amendment was barred by the statute of limitations and, furthermore, had no merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). H.R. at 351.

b. The *Brady* Claims

In its August 18, 2002 order, the trial court also dismissed most of the habeas claims related to the alleged misconduct. *Pet. App.* at 38-48. However, the trial court also ordered an evidentiary hearing limited to the issue of when the prosecutor came into possession of a photograph and a videotape of Sirena. *Pet. App.* at 48-49. The trial court later entered a discovery order requiring the respondent to produce "the photograph of 'Sirena' a/k/a Julio Cesar Osorto Herrera . . . and any information possessed by the Fairfax Police Department pertaining to Sirena, a/k/a Julio Cesar Osorto Herrera." H.R. at 348.

In response, the Director produced several letters and exhibits including (1) a police report from Officer Mahoney and (2) notes from the lead detective of an interview with one of the members of Mr. Bustillo's gang, Amaya Canas. H.R. 365.[7]

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[7] Two documents disclosed to the petitioner in discovery are at issue. The first is a police report from Officer Mahoney dated December 10, 1997. The Mahoney report notes that "Osorto, Julio C." was stopped during a canvass of the area following the attack. The report notes that "Mr. Osorto has what appeared to be ketchup on his pant legs and a little on his shirt. He claimed he had come from McDonald's where he had eaten a cheeseburger. . . . He stated he lived at Chelsey Square

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Following the evidentiary hearing on December 5, 2002, the trial court denied habeas relief, holding that the undisclosed documents were not material. H.R. 454-58. On February 21, 2003, the trial court entered a final order to that effect. H.R. 468-69.

Mr. Bustillo next filed a motion to reconsider and a motion for another evidentiary hearing based on the police documents disclosed in habeas discovery. H.R. 481. The trial court overruled the Director's objections and stayed its final order. H.R. 471, 472-74. Mr. Bustillo subsequently filed motions to amend his petition to include a new *Brady* claim for failure to disclose these documents.

By letter opinion dated September 16, 2003, the trial court concluded that the information contained in the Mahoney report and the interview of Amaya Canas were exculpatory and should have been disclosed. Concerning Officer Mahoney's report, the trial court noted, in hind-sight, that the officers "*should have known*, given the contents of the investigative notes and the police report,

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Apartments, but was confused on the address." He denied being present at the Popeye's. Osorto was described as wearing a "Blk leather Jacket, Blue Jeans." H.R. 366-67.

The Director also disclosed police notes of an interview with a gang member, Jose Armando Amaya (Canas). Although these notes are described in part in the memorandum opinion of the court, the actual notes are not a part of the habeas record as Mr. Bustillo never moved for their admission. *Pet. App.* at 5 n.6. In the notes, Mr. Canas states that he observed Sirena running with a "cocked" bat towards Mr. Merry but that he could not see who struck Mr. Merry. At trial, the prosecution had disclosed in a discovery response that this witness told law enforcement that he saw the defendant and Sirena at the scene and both had bats. Both Mr. Bustillo and Sirena approached the victim with Sirena following Mr. Bustillo. Mr. Canas' view was obstructed by a brick pillar and he couldn't tell which one struck the victim. T.R. at 17.

that 'Sirena-Julio' and Julio Osorto *might be* one and the same person." H.R. 486 (emphasis added). The court granted the motion for reconsideration and ordered a hearing to determine whether a reasonable probability existed that "had the evidence been disclosed to the defense, the result of the criminal trial might have been different." H.R. at 491.

Following an evidentiary hearing on April 7, 2004, the court issued a detailed memorandum opinion concluding that even if the evidence had been disclosed to Mr. Bustillo, there was no reasonable likelihood of a different outcome. *Pet. App.* at 3-16.

5. Appeal of the Denial of the State Habeas Petition

Mr. Bustillo petitioned the Supreme Court of Virginia to hear his appeal of the denial of the habeas petition. With respect to the Vienna Convention claim, the Supreme Court of Virginia held that "there is no reversible error in the judgment complained of. . . . " *Pet. App.* at 1. As to the *Brady* claims, the court dismissed "the petition for appeal as to those assignments of error" because Mr. Bustillo "failed to file the habeas proceeding transcript(s)." *Pet. App.* at 1. This Petition followed.

REASONS FOR DENYING THE WRIT

Certiorari should be denied for two reasons. First, this Court should decline to review the Vienna Convention issue because this is an inappropriate vehicle to resolve the questions. Mr. Bustillo's claim is barred by the *Teague* rule. Moreover, in deciding the Vienna Convention issue, the lower court did not address a federal question, but

relied exclusively on state law. Furthermore, because there was no prejudice to Mr. Bustillo, the failure to follow the Vienna Convention was harmless error.

Second, this Court should decline to review the *Brady* claims. Initially, the claims are barred by an adequate and independent state ground. Moreover, the claims present nothing more than a routine *Brady* dispute.

I. THIS COURT SHOULD DECLINE TO REVIEW THE VIENNA CONVENTION ISSUE.

As the grant of certiorari in *Medellin* demonstrates, the Vienna Convention issue is important. However, this Petition provides a poor vehicle for resolving the issue. This is so for three reasons. First, the *Teague* rule bars Mr. Bustillo's claim. Second, the lower court's resolution of the Vienna Convention issue was based on state law and did not involve a federal question. Third, Mr. Bustillo was not prejudiced by the failure to follow the Vienna Convention.

A. Because His Conviction Became Final Before the Announcement of a "New" Rule, the *Teague* Rule Bars Mr. Bustillo's Vienna Convention Claim.

Regardless of whether the Vienna Convention creates judicially enforceable individual rights and whether the Vienna Convention requires state courts to ignore their procedural rules, Mr. Bustillo's claim is barred by the *Teague* rule.

Under this Court's precedents, a state conviction cannot be disturbed on federal collateral review based on a

"new rule" of federal law – a rule which was announced after a conviction became final.[8] *Teague*, 489 U.S. at 306-07. A conviction becomes final when the Court denies certiorari. *See O'Dell v. Netherland*, 521 U.S. 151, 157 (1997). Thus, Mr. Bustillo's conviction became final on June 4, 2001, when this Court denied certiorari. *See Bustillo*, 532 U.S. at 1072. Therefore, Mr. Bustillo can obtain habeas relief only if he can demonstrate that the rule he seeks to enforce – that the Vienna Convention creates judicially enforceable individual rights – existed prior to June 4, 2001.

Mr. Bustillo cannot meet this burden. First, this Court has never held that the Vienna Convention creates judicially enforceable individual rights. Indeed, Mr. Bustillo expressly urges this Court to overrule its decision in *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*), and adopt a new rule. Cert. Pet. at 19. Second, even if *Avena* and *LaGrand* are regarded as announcing a new rule binding on this Court and the lower courts, both of those decisions were rendered *after* Mr. Bustillo's conviction became final.[9] *Avena* was decided more than two years after Mr. Bustillo's conviction became final – and more than six years after his trial. *LaGrand* was decided on

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[8] Indeed, the *Teague* rule was one reason why this Court dismissed the Writ in *Medellin*. *See Medellin*, 125 S. Ct. at 2091.

[9] On March 7, 2005, President Bush, through his Secretary of State, notified the United Nations that the United States had formally withdrawn from the jurisdiction of the International Court of Justice (ICJ) in disputes over Vienna Convention claims. http://www.discourse.net/archives/2005/03/us_announces_withdrawal_from_consular_convention.html. Thus, whatever argument existed previously that the International Court of Justice's decisions were binding on United States courts is now largely academic.

June 27, 2001, just over three weeks after this Court denied certiorari. Thus, *Teague* precludes relief.[10]

If this Court is going to determine whether the Vienna Convention creates judicially enforceable individual rights, it should do so in a case where the conviction is not final. In other words, any new rule should come in a case on direct appeal, not a habeas corpus petition. Because Mr. Bustillo's conviction is final, his Petition should not be the mechanism for resolving the issue. Certiorari should be denied.

B. Because the State Court's Decision Regarding the Vienna Convention Issue Rested Exclusively on State Law, Certiorari Review Is Inappropriate.

Regardless of whether the Vienna Convention creates a judicially enforceable right or whether the *Teague* rule applies, the lower court's resolution of the Vienna Convention issue did not involve a federal question. To explain, it is essential that this Court understands the nature of the judgment below. Neither the trial court nor the Supreme Court of Virginia interpreted the Vienna Convention. Rather, both lower courts simply held that, as a matter of state law, the Vienna Convention claim was not cognizable in a Virginia habeas corpus proceeding. Because the decision regarding the Vienna Convention issue did not address a federal law question and relied exclusively on

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[10] Although most cases applying *Teague* have involved a federal habeas petition, nothing in the Court's reasoning limits the holding in *Teague* to that situation. The *Teague* Court plainly held that, subject to limited exceptions, new rules "will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310.

state law, there is no basis for this Court to review the decision. *See Volt Info. Scis., Inc. v. Board of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) ("this Court does not sit to review" questions of state law).

As with other extraordinary writs, Virginia law narrowly delineates the scope of the writ of *habeas corpus*. *See Virginia Code* §§ 8.01-635 through 668. Under long-standing Virginia law, "a claim that *could* have been raised at the criminal trial or on direct appeal is *not cognizable* in [state] habeas corpus [proceedings]. . . . " *Henry v. Warden*, 576 S.E.2d 495, 496 (Va. 2003) (emphasis in original and added, respectively). "Because allegations of trial court error are not cognizable by habeas corpus, habeas cannot be used as a substitute for an appeal." *Dodson v. Director*, 355 S.E.2d 573, 575 n.4 (Va. 1987) (internal citations omitted). Indeed, absent a showing of ineffective assistance of counsel, a Virginia trial court errs in even "permitting inquiry" on a question that could have been raised at trial and pursued on appeal. *Slayton*, 205 S.E.2d at 682. In other words, as a matter of state law, Virginia's state courts' authority to issue a writ of habeas corpus is limited to: (1) claims that could not have been raised at trial or on direct appeal, (2) lack of subject matter jurisdiction and (3) claims of ineffective assistance of counsel.

As a matter of *state law*, Mr. Bustillo utilized a proceeding that could not reach the Vienna Convention issue he raised.[11] In dismissing the Vienna Convention claim, the Virginia courts relied exclusively on state law. Virginia

[11] Mr. Bustillo was not without a remedy in state court. He could have pursued a claim that his attorney was ineffective for failing to raise the issue. However, he abandoned that claim in state court.

courts did not, and indeed could not, as a matter of state law reach the question Mr. Bustillo sought to raise.[11] Because the state court's judgment rested exclusively on state law regarding the scope of a state writ of habeas corpus, review on certiorari is inappropriate.[12]

Regardless of whether the Vienna Convention creates judicially enforceable individual rights, and whether Mr. Bustillo's claim is barred by the *Teague* rule, the Vienna Convention does not require Virginia courts to ignore Virginia law. Certiorari is barred by an adequate and independent state ground.

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[11] Furthermore, Mr. Bustillo asks the Court to require state courts to entertain Vienna Convention claims regardless of any state law impediments or the nature of the state proceeding below. To accomplish this end, this Court would have to dictate to state courts the scope they should attribute to a state law writ. This would constitute an unprecedented and, under the federalist structure of our government, an unconstitutional measure.

[12] Although review by certiorari is inappropriate, Mr. Bustillo could obtain review of his Vienna Convention claim by seeking an "original" writ of habeas corpus in this Court. *See* Sup. Ct. R. 20.4. While state or federal procedural rules may preclude certiorari review of habeas claims, they do not diminish this Court's ability to review such claims through an "original" writ of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) ("The Act [*Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, 110 Stat. 1217 (1996)] does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."). *See also id.* at 666 (Stevens, J., joined by Souter & Breyer, J.J., concurring) ("As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus.").

C. Because Mr. Bustillo Was Not Prejudiced, the Failure to Follow the Vienna Convention Was Harmless Error.

Regardless of whether the Vienna Convention creates judicially enforceable individual rights, whether the *Teague* rule applies, or whether the Vienna Convention requires state courts to ignore their own procedural rules, the failure to follow the Vienna Convention was harmless error. Quite simply, Mr. Bustillo was not prejudiced by the arresting officers' failure to follow the Vienna Convention.[14]

To explain, Mr. Bustillo asserts that the failure to follow the Vienna Convention harmed him in three ways. First, he asserts that if the Honduran consular officials had been alerted, they could have obtained confirmation of the identity of Sirena and produced a photograph. Indeed, Mr. Bustillo claims that "when confronted with the photo of Sirena later provided by the Honduran government, several witnesses identified Sirena as the individual who struck [Mr.] Merry." *Pet.* at 24. Second, Mr. Bustillo asserts that the Honduran consulate would have provided confirmation that Sirena was on the flight to Honduras, in support of the trial testimony provided by Ulma Martinez. Tr. 03/18/98 at 167-68. Mr. Bustillo believes that Sirena's

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[14] Moreover, it is unclear that Mr. Bustillo would have availed himself of his Vienna Convention rights if he had been advised of those rights. Although Mr. Bustillo insists that the Director "has never disputed petitioner's sworn statement that . . . he would have requested to speak with consular officials," *Pet.* at 23 n.6, this is inaccurate. In the motion to dismiss, the Director denied each allegation not specifically admitted in the motion. Since the factual aspects of the Vienna Convention claim have not been developed, the veracity of Mr. Bustillo's assertion has never been tested.

travel to Honduras constitutes "powerful evidence" of Sirena's guilt, for "[t]he guilty 'flee when no man pursueth.'" *Pet.* at 22-23 (quoting Proverbs 28:1). Finally, Mr. Bustillo claims that, if the Honduran authorities had been involved, the videotaped "confession" of Sirena might have been obtained prior to trial and would have altered the outcome.[15] The Director disagrees with each of these assertions.

1. Obtaining the Photograph Before Trial Would Not Have Altered the Outcome.

Obtaining the photograph before trial would not have altered the outcome. The proffered testimony in the affidavits attached to the habeas petition is utterly unworthy of belief by any reasonable fact-finder. The witnesses Mr. Bustillo relies on consist chiefly of a parade of obviously biased gang members: Amilcar Amaya, Lisandro Parada, Marvin Escobar, and Godofredo Jimenez. T.R. at 465; Tr. 03/18/98 at 90-91; Tr. 07/13/98 at 39, 54. All of these "witnesses" have provided conflicting accounts and have shown what could charitably be described as a remarkable flexibility in their recollection. This flexibility would have been obvious to any fact-finder.

When interviewed by trial counsel, Mr. Escobar – who had known Sirena for three years and Mr. Bustillo for one

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[15] Mr. Bustillo also suggests that had he been informed of his Vienna Convention rights, the Honduran police might have obtained a surreptitiously videotaped confession from Sirena such as the one he proffered in the habeas corpus proceeding. However, Mr. Bustillo himself had to obtain this purported confession; nothing in the record suggests the police would have done so, or that it could have been done in time to assist him at his trial.

year – said he did not know who struck the blow. Tr. 07/13/98 at 94-95. By the time of the post-trial motion to reconsider, Mr. Escobar was sure it was Sirena. Tr. 07/13/98 at 43. Following the second habeas hearing, the trial court found Amilcar Amaya's testimony was not credible and specifically noted his inconsistencies. *Pet. App.* at 11. Mr. Jimenez, contrary to his more recent version, told the police that Mr. Bustillo was present – undermining Mr. Bustillo's alibi – and that he did not see who committed the assault. (Resp. Mot. to Dismiss Ex. 1, ¶ 2).

Claudia Tafur, Esmirna Christina Hondoy, and Yahayra Queirolo also provided affidavits in support of the habeas petition. Each also identified Sirena from the photograph as the assailant. T.R. at 285, 388, 392, 497. Although they are not gang members, their testimony is also vacillating and implausible. Ms. Tafur said on the evening of the attack, December 10, 1997, that Mr. Bustillo was the assailant. T.R. at 285. Ms. Tafur knew Sirena because she previously dated him and she went to school with Mr. Bustillo. T.R. at 388. A year and a half later, on June 16, 1999, she had come to understand that she "did not see enough of the assailant's face to be able to accurately concluse [sic] who it was." T.R. at 285. By December 18, 2001, four years after the attack, her memory had improved to the point where she now knew that Sirena was really the assailant. T.R. at 388.

Ms. Hondoy noted in her habeas affidavit that the photograph of Julio Osorto Herrera "resembles the person who struck Merry." T.R. at 392. However, she told the police the day after the attack that she knew Mr. Bustillo and that she saw him strike Mr. Merry with the bat. Tr. 03/18/98 at 188-90; T.R. at 180. Following the attack, she obtained money from the petitioner's father. Tr. 03/18/98 at

149-50. By the time of trial, she was sure Mr. Bustillo was not the assailant. Tr. 03/18/98 at 142-43. At that point, she had "no idea who the person is" that attacked Mr. Merry. Tr. 03/18/98 at 142-43. She also could not recall whether she told the police she knew Mr. Bustillo. Tr. 03/18/98 at 157.

Ms. Queirolo told Detective Cline that she saw Mr. Bustillo swing the bat, but did not see the actual impact. T.R. 179. She said she had known Mr. Bustillo for a year, and had seen him at "parties and stuff." Trial exhibits, Def. Ex. I; Tr. 06/17/98 at 12; T.R. at 467. Ms. Queirolo said she knew Sirena because one of her friends used to date him. T.R. at 467. Several weeks before trial, she became unsure, but she said the assailant "could be" Mr. Bustillo. Tr. 06/17/98 at 13-14. Three and a half years later, she had become convinced the attacker was Sirena. T.R. at 467.

Given these circumstances, there is no reasonable probability that any reasonable fact finder would credit such inconsistent testimony. Indeed, it would likely strengthen the fact finder's conclusion that Mr. Bustillo was guilty. At the hearing on the motion to reconsider the verdict, the trial court made this observation, noting that adducing testimony from such witnesses "if anything, it may have produced a more harsh result. . . . " Tr. 07/13/98 at 260-61. Moreover, these witnesses were all known to trial counsel, who made a tactical decision not to call them. H.R. 242-46; Tr. 06/17/98 at 14; Tr. 07/13/98 at 92-93, 102. Since the witnesses were purposefully not called at trial, Mr. Bustillo's claim of prejudice evaporates. In addition, Mr. Bustillo obtained a photograph of Sirena nearly three months before the trial court entered its final order. Tr. 07/13/98 at 143-45; T.R. at 244. If he wanted to test the recollection of the witnesses with that photograph, he certainly had the opportunity to do so before final

judgment. He did so with Ms. Queirolo in a post-trial hearing. Tr. 06/17/98 at 8-10. Mr. Bustillo chose to forego the opportunity with other witnesses. Finally, since the vast majority of these witnesses knew Sirena, some of them over a period of years, or shared membership in the Commerce Street Locos gang, or even dated him, it is difficult to comprehend why a photograph was so necessary for identification.

2. Confirmation of Sirena's Flight Would Not Have Altered the Outcome.

Confirmation of Sirena's flight to Honduras would not have altered the outcome. If, as Mr. Bustillo asserts, Sirena was not only present at the crime scene but also running behind Mr. Bustillo, bat in hand, toward the victim, he was as guilty as the perpetrator in the eyes of the law. *See Taylor v. Virginia*, 537 S.E.2d 592, 594 (Va. 2000); *Moehring v. Virginia*, 290 S.E.2d 891, 892 (Va. 1982). The police had stopped and questioned Julio Osorto on the night of the attack. Therefore, assuming Mr. Osorto and Sirena are the same, he had a compelling motive to flee, regardless of the petitioner's guilt.

Moreover, at trial, Ms. Martinez testified without contradiction that Sirena had left the United States shortly after the attack. Tr. 03/18/98 at 167-69. Further minimizing any prejudice along these lines, Detective Cline confirmed that Sirena could not be found in the weeks following the attack. Tr. 03/18/98 at 70-71. Mr. Amaya also said he had not seen Sirena since the assault. Tr. 03/18/98 at 101-02. Additionally, Mr. Bustillo's counsel was aware of other witnesses who could have placed Sirena at the crime scene and corroborated his existence,

including Mr. Canas, who told the police he saw Sirena "cock" the bat. However, Mr. Bustillo's counsel made a strategic decision not to call those witnesses owing, in part, to their "dubious credibility." *Pet. App.* at 14, n.43. Finally, this tangential information, a photograph and confirmation of the flight, do not alter the fundamental evidence against the petitioner: three eyewitnesses, two of whom knew Mr. Bustillo, who had seen him enter the restaurant moments before the attack, identified him in good light as the assailant. In contrast, Mr. Bustillo's inconsistent and biased witnesses have failed to convince each time they have been called to testify.

3. Sirena's "Confession" Would Not Have Altered the Outcome.

Sirena's "confession" would not have altered the outcome. Even if the "confession" could have been procured in time for use at trial, a most doubtful proposition, it would not have been admissible under state or federal law. Although both this Court and the Supreme Court of Virginia have allowed the admissibility of third party-confessions, *see Chambers v. Mississippi*, 410 U.S. 284, 287-89 (1973), *Hines v. Virginia*, 117 S.E. 843, 845 (Va. 1923), such evidence was held to be admissible only in circumstances that strongly suggested the reliability of the third-party confession: the confession was made repeatedly to neutral witnesses who were available to testify. In this instance, "Sirena," a member of the Commerce Street Locos gang who is beyond the reach of cross-examination, supposedly provided a videotaped statement at the prodding of another gang member, for the benefit of an incarcerated member of his gang. No Virginia court would admit a third-party confession under such circumstances.

In sum, even if Mr. Bustillo had been aware of his right to contact consular officials and had done so, the outcome would not have been different. The failure to follow the Vienna Convention was harmless error. If this Court is going to decide whether the Vienna Convention creates judicially enforceable individual rights, it should do so in a case where the answer to that question actually matters.[16] It should not do so in a case, such as this one, where the failure to follow the Vienna Convention violation is harmless error. Certiorari should be denied.

II. THIS COURT SHOULD DENY REVIEW OF THE *BRADY* CLAIMS.

Regardless of whether this Court grants certiorari on the Vienna Convention issue, it should deny certiorari on the *Brady* claims. This is so for two reasons. First, there is an adequate and independent state ground for dismissal of the *Brady* claims. Second, regardless of whether there is an adequate and independent state ground, Mr. Bustillo's *Brady* claims are routine and unworthy of this Court's review.

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[16] Moreover, this Court should wait for further developments in the lower courts and foreign courts. Since the dismissal of the Writ in *Medellin*, there is no published authority from any court – state or federal – addressing whether the Vienna Convention creates judicially enforceable individual rights. Nor does Mr. Bustillo offer any authority from signatory states to the Vienna Convention adopting or rejecting *Avena's* reasoning.

A. There Is an Adequate and Independent State Ground for Dismissal of the *Brady* Claims.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court summarized its longstanding jurisprudence and emphasized that:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . This rule applies whether the state law ground is substantive or procedural. . . . In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Id. at 729 (citations omitted). In other words, this Court will not review a decision of a state court which is based on state law – whether it is substantive or procedural.

In the present Petition, the lower court dismissed Mr. Bustillo's *Brady* claims because he had not timely filed the transcripts of the evidentiary hearing, a violation of Virginia Supreme Court Rule 5:11(a). *Pet. App.* at 1. The procedural bar in question was firmly established and is regularly followed. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (State procedural default is an "independent and adequate state procedural bar" barring subsequent federal review when the state rule was "'firmly established and regularly followed'" at the time it was applied.).

First, the rule is hardly a new one. *See Towler v. Virginia*, 221 S.E.2d 119, 121 (Va. 1976) (Transcripts that are indispensable to adjudication which are not properly made part of the record will result in appeal being dismissed.). Furthermore, the rule has been regularly and consistently applied. *Palmer v. Virginia*, 609 S.E.2d 308, 309 n.2 (Va. 2005) (noting first appeal was dismissed in Court of Appeals of Virginia for failure to timely file a transcript); *Henry*, 576 S.E.2d at 495 n.2 (same); *Turner v. Virginia*, 341 S.E.2d 400, 402 (Va. App. 1986); *Barrett v. Barrett*, 339 S.E.2d 208, 209-10 (Va. App. 1986). Indeed, the Supreme Court of Virginia recently dismissed a habeas corpus appeal brought by a local government because it had not timely filed the transcripts. *Virginia v. Raja*, Record No. 042846 (Va. July 6, 2005) (available at http://www.courts.state.va.us/).

Mr. Bustillo contends that the state court erroneously applied its own law because the memorandum opinion of the trial court enabled the appellate court to reach the issue. The only decision Mr. Bustillo can offer from the Supreme Court of Virginia is *Roe v. Roe*, 324 S.E.2d 691, 692 n.1 (Va. 1985), where the Court concluded that the opinion of the trial court sufficed to allow the appellate court to reach the issues. What he neglects to mention, however, is the Court's observation in *Roe* that the facts in that case were "entirely undisputed." *Id.* In the case at bar, in contrast, the evidence was sharply contested. *Roe*, therefore, lends the petitioner no support.

The fact that on rare occasions the transcript is not necessary to reach the issues does not alter the fact that the rule is consistently applied. For example, in *Wolfe v. Virginia*, 371 S.E.2d 314, 316 (Va. App. 1988), the court concluded that the record, without the transcript, was

sufficient. In so doing, however, the court stated: "[w]e emphasize that our decision to review this case without a trial transcript or statement of facts is the rare exception rather than the general rule. The trial transcript usually is indispensable." *Id.* Moreover, the consistent or regular application of a State's procedural default rules does not mean undeviating adherence to such rule admitting of no exception. *See Dugger v. Adams*, 489 U.S. 401, 410-12 n.6 (1989) (Despite possible exceptions, the procedural bar at issue was applied by Florida's highest court "[i]n the vast majority of cases.").

The transcript in this case was indispensable. Presumably because the petitioner's own evidence failed to establish any materiality, the circuit court's memorandum opinion did not discuss the respondent's evidence. At the hearing, the respondent adduced evidence from the medical examiner that performed the autopsy on the victim, from three firefighters who were at the crime scene and from one police officer, all of whom testified to the lack of blood spatter. Finally, one of the officers who detained Sirena on the night of the attack testified about his observations of the red "stains" on Sirena. Due to the absence of transcripts, the Supreme Court of Virginia determined it could not review this evidence and properly dismissed the assignments of error that required those transcripts.

B. There Is No Need to Review the State Court's Resolution of Common *Brady* Claims.

Regardless of whether Mr. Bustillo can somehow evade the adequate and independent state default, he fails to present any issue beyond a routine dispute concerning the materiality of certain undisclosed notes from the

police. A writ of certiorari will be granted only for "compelling reasons." Sup. Ct. R. 10. Furthermore, this Court does not provide case-specific error correction. *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari); *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, joined by Stevens, Ginsburg & Breyer, J.J., dissenting) (noting it is "axiomatic that this Court cannot devote itself to error correction. . . . ").

Nor was there any error in the approach employed by the trial court. The evidence was uncontested that the victim was struck once in the head by a bat-wielding assailant, who immediately fled. Tr. 03/17/98 at 222, 264; Tr. 03/18/98 at 27, 111. The medical examiner testified there was no breaking of the skin where the injury took place. Tr. 03/17/98 at 193. Mr. Bustillo attempted to prove that the stains on Sirena, which are described by an experienced police officer as appearing to be ketchup, not blood, were in reality the victim's blood. However, he failed to prove that the victim's blood, most improbably, immediately shot out of the victim's ear on impact and, by amazing coincidence, landed on the rapidly fleeing assailant, all without contaminating the baseball bat employed in the attack. His own expert, as the memorandum of the trial court reflects, testified at one point that the blow to the victim's head would have caused blood to "seep" out of the victim's ear. This account, the trial court found, was consistent with the crime scene photographs that display only a few sizable droplets of blood, but no signs of spatter or spray. The trial court also did not find credible the inconsistent

accounts from the two witnesses who claimed to have seen the victim's blood spray on others.[16]

CONCLUSION

The petition for a writ of certiorari should be **DENIED**.

Respectfully submitted,

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September 23, 2005

[16] Mr. Bustillo argues that the eyewitnesses who identified him were mistaken because they made their identification based on the assailant's clothes. He claims that Sirena was wearing a red shirt, and Mr. Bustillo had been seen earlier wearing a red shirt. *Pet. App.* at 8. However, the report from Officer Mahoney, the document Mr. Bustillo claims to be exculpatory, shows that Sirena was wearing a black leather jacket. If the "red stains" were visible on his shirt, it is most unlikely he wore anything red under his leather jacket. Therefore, this police report would have actually undermined the defense theory of mistaken identification.

(4)

No. 05-51

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IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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REPLY BRIEF FOR PETITIONER

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REPLY FOR PETITIONER

Respondent concedes the importance of the issues presented. Br. in Opp. 12. Respondent also admits that the International Court of Justice (ICJ) twice has "held that the Vienna Convention on Consular Relations * * * creates judicially enforceable individual rights and that American courts" may not invoke "procedural rules" to avoid "enforcing those rights." Br. in Opp. 1. Respondent does not deny that the courts of this Nation have reached conflicting results. Pet. 15-20. Nor does respondent dispute the need for this Court to issue a definitive interpretation of Article 36 of the Vienna Convention. *Ibid.* This Court, in fact, granted review to consider these issues in a related context last Term, but was unable to reach them. *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005). Pet. 20-22; Br. in Opp. 1, 12. Since then, the importance of this issue has become even more apparent.[1]

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[1] As set forth in the petition (at 16-18), at least 34 different state and federal courts have been confronted with Vienna Convention claims, many repeatedly, without any movement toward a consensus on the proper construction of Article 36. It is thus unclear what benefit this Court could derive by "wait[ing] for further developments in the lower courts and foreign courts." Br. in Opp. 23 n.16. In fact, at least 13 additional federal and state cases involving Vienna Convention claims have been decided since this petition was filed on July 5, 2005. *Rosales* v. *Bureau of Immigration & Customs Enforcement*, No. 04-10630, 2005 WL 2292526 (5th Cir. Sept. 21, 2005); *Adams* v. *Apker*, No. 05-2350, 2005 WL 2082919 (3d Cir. Aug. 30 2005); *Gomez* v. *Dretke*, No. 04-70047, 2005 WL 1983693 (5th Cir. Aug. 17, 2005); *Wright* v. *Rasbeary*, No. 04-11204, 2005 WL 1950779 (5th Cir. Aug. 16, 2005); *United States* v. *Cobain*, No. 04-30412, 2005 WL1901583 (9th Cir. Aug. 10, 2005); *Rosero* v. *United States*, No. 803CR82T17EAJ, 2005 WL 2372012 (M.D. Fla. Sept. 27, 2005); *Bieregu* v. *United States*, No. Civ. A. 05-2692(DRD), 2005 WL 2237686 (D.N.J. Sept. 14, 2005); *Ortiz* v. *United States*, No. 8:02-CV-905-T-30TBM, 2005 WL 2129191 (M.D. Fla. Sept. 2, 2005); *United States* v. *Hall*, No. CR-03-910 CPS, 2005 WL 1984463 (E.D.N.Y. Aug. 17, 2005); *People* v. *Moreno*, No. B177572, 2005 WL 2374746 (Cal. Ct. App. Sept. 28, 2005); *Ramirez* v. *State*, No. S05A0664, 2005 WL 2264638 (Ga. Sept. 19, 2005); *People* v. *Tapia-Fierro*, No. F046280, 2005 WL 2249007 (Cal. Ct. App. Sept. 15, 2005); *Torres* v. *State*, No. PCD-2004-442, 2005 WL 2130195 (Okla. Crim. App. Sept. 6, 2005).

Respondent nonetheless suggests there are barriers to review in this case. That claim is wholly unpersuasive. In fact, close review of respondent's arguments demonstrates that this case is an ideal vehicle for further review.

I. This Case Squarely Presents The Vienna Convention Issues

While conceding the importance of the Vienna Convention issues, Br. in Opp. 12, respondent asserts that this case presents a "poor vehicle" for resolving them because of (a) a state procedural bar and (b) the effects of *Teague* v. *Lane*, 489 U.S. 288 (1989), an issue respondent never raised below. Neither claim has merit, and the latter is clearly waived.

A. Whether State Procedural Bars May Preclude Vienna Convention Claims Is The Very Question Presented By The Petition

Respondent urges this Court to deny the petition because the Virginia courts denied the Vienna Convention claims solely on the basis of state law. Br. in Opp. 14-16. In particular, respondent points to the state-law procedural bar resulting from petitioner's putative failure to raise the Vienna Convention when he first appealed his conviction. See *ibid.* But the validity of such procedural bars against Vienna Convention claims *is one of the very questions presented for this Court's review*—and one of the issues this Court previously sought to resolve in *Medellín*. See Pet. i; *Medellín*, 125 S. Ct. at 2089.

As respondent concedes, Br. in Opp. 1, the ICJ has held that States may *not* invoke such procedural bars because they violate Article 36 of the Vienna Convention, preventing "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *LaGrand Case (F.R.G.* v. *U.S.)*, 2001 I.C.J. 466, ¶ 91 (June 27) (quoting Vienna Convention, art. 36(2), 21 U.S.T. at 101); *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128, ¶ 113 (Mar. 31) (similar); see Pet. 15-16. The question presented below to the Virginia courts, and now to this Court, is whether Article 36 of the Vienna Convention—a federal treaty that supersedes inconsistent state laws under

the Supremacy Clause—requires Virginia to provide a forum for Vienna Convention claims *despite* the Commonwealth's procedural default rules. As in *Medellín*, "the relevant federal question [is] whether, under Article 36(2), the treaty overrides state procedural default rules." 125 S. Ct. at 2099 (O'Connor, J., dissenting). In the decision below, the Virginia Supreme Court answered that question in the negative, finding "no reversible error" in the circuit court's invocation of Virginia's procedural default rules (despite petitioner's invocation of the Vienna Convention and the ICJ's decisions interpreting it). Pet. App. 1a; Pet. for Review 14-15, 32-33 (Va. S. Ct., filed Sept. 3, 2004). The question presented here is whether that ruling—an issue of federal law involving the construction of an international treaty—was correct.

B. Respondent's Effort To Invoke *Teague* v. *Lane* Is Misplaced And Waived In Any Event

Respondent also urges (Br. in Opp. 12-14) that *Teague* v. *Lane* precludes this Court from addressing the Vienna Convention issues because their resolution might require the Court to announce a "new rule" of criminal procedure. As explained *infra* (at 6-7), respondent never asserted *Teague* arguments (or any retroactivity claim) below, despite ample opportunity to do so. As a result, that claim is waived. Moreover, *Teague* is wholly inapposite. That case articulates a rule applicable to courts on *federal* habeas review. It does not purport to address the applicability of federal law in *state* habeas proceedings or in this Court on direct review of those state proceedings.

1. Setting aside (for the moment) respondent's clear waiver of the *Teague* objection, *Teague* has no application here. In *Teague*, this Court declined to consider a novel Sixth Amendment claim raised for the first time in *federal* habeas corpus proceedings. The Court held that *federal* "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure," subject to two exceptions. 489 U.S. at 317. The Court implemented the *Teague* rule to recognize the more deferential "purpose of *federal* habeas corpus," *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990) (emphasis

added), and repeatedly has characterized *Teague* as a decision regarding the scope of *federal* habeas review of state convictions. See, *e.g.*, *Beard* v. *Banks*, 124 S. Ct. 2504, 2511 (2004); *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994); *Stringer* v. *Black*, 503 U.S. 222, 227-228 (1992). As respondent admits, *Teague* established that "a state conviction cannot be disturbed on *federal* collateral review based on a 'new rule' of federal law." Br. in Opp. 12-13 (emphasis added).

This case, however, does not arise on federal habeas review. It arises on this Court's *direct review* of a *state* habeas decision. Respondent does not explain why *Teague* would apply in that context. And this Court has *never* applied *Teague* on direct review of *state* habeas proceedings. To the contrary, this Court has repeatedly considered "new rules" on review of state habeas decisions without even mentioning *Teague*. See, *e.g.*, *Roper* v. *Simmons*, 125 S. Ct. 1183 (2005); *Victor* v. *Nebraska*, 511 U.S. 1 (1994). *Roper*, for example, announced that the Constitution forbids imposition of the death penalty on an offender who was under the age of 18 at the time of the offense—a rule so "new" that it required the Court to overrule a prior decision. See *Roper*, 125 S. Ct. at 1192. Even though *Roper* arose on direct review of a state habeas decision, this Court's decision never so much as mentioned *Teague*, and with good reason: *Teague* is a rule about *federal* habeas—not state habeas.

Respondent's effort to impose *Teague* on state habeas is fundamentally at odds with the principles of federalism undergirding that decision. Subject to the Supremacy Clause (and the constitutional and treaty obligations that follow), the scope of state habeas is primarily an issue of state law. This Court decided *Teague* as a matter of federal common law (or perhaps as a construction of the federal habeas statute), not constitutional law. As a result, there is no basis for requiring its application to state habeas proceedings. See *State* v. *Whitfield*, 107 S.W.3d 253, 267 (Mo. 2003) (holding that *Teague* does not apply on state habeas); *Meadows* v. *State*, 849 S.W.2d 748, 755 (Tenn. 1993) (same). It would be ironic if *Teague*, which was founded on principles of federalism, were applied to

preclude the States from *choosing* to give retroactive effect to this Court's decisions in state habeas proceedings. Cf. *Great N. Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932) ("A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.").

Nor is there any basis for applying *Teague* to this Court's *direct* review of state court habeas decisions that, without addressing retroactivity, resolve important issues of federal law. See, *e.g.*, *Roper*, 125 S. Ct. at 1189; *Victor*, 511 U.S. at 18-19. Where state courts choose to address issues of federal law, their decisions are subject to review by this Court. There is no principled basis for declaring that state courts may address important issues of federal law but then preclude this Court's direct review of the resulting decisions.

Respondent's novel expansion of *Teague* would also lead to anomalous results. It would effectively foreclose this Court's review of a host of claims that can be raised only on collateral review, such as ineffective assistance of counsel, as well as challenges to the constitutionality of state habeas procedures. Once a state establishes its own habeas procedures, they are subject to constitutional scrutiny in this Court. See *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987); *Long* v. *Dist. Court of Iowa*, 385 U.S. 192 (1966); *Smith* v. *Bennett*, 365 U.S. 708 (1961). The validity of a state habeas procedure (here, the invocation of a procedural bar to preclude review of a federal treaty violation) cannot be raised on direct review, because the issue would not be ripe. Accordingly, this Court *must* be able to review such a claim on direct review of state habeas decisions. *Arizona* v. *Evans*, 514 U.S. 1, 9 (1995) ("'important federal issues * * * will reach this Court for adjudication'"; "'state courts will not be the final arbiters of important issues under the federal constitution'") (quoting *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).[2]

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[2] Respondent posits that prisoners may petition this Court for an extraordinary writ, Br. in Opp. 16 n.13, but this Court's power to issue an "original" writ is greatly circumscribed; no petitioner has obtained

The effort to apply *Teague* to preclude consideration of petitioner's Vienna Convention claims, moreover, suffers from the same defect as the Commonwealth's invocation of its own procedural bar. If the Vienna Convention precludes States from invoking procedural bars where doing so prevents "'full effect [from being] given to the purposes for which the rights accorded [by Article 36 of the Vienna Convention] are intended'"—as the ICJ has held—then the same is true of efforts to invoke *Teague* to prevent consideration of otherwise meritorious Vienna Convention claims. Respondent's *Teague* argument thus begs precisely the same question as the procedural bar argument—whether procedural rules that allow courts to refuse to hear Vienna Convention claims are consistent with Article 36(2). Thus, far from precluding the Court from reaching the questions presented, petitioner's novel *Teague* argument underscores their importance.

2. Merits aside, this Court need not address the *Teague* argument because respondent waived it. *Teague* is not jurisdictional; it may be waived by failing to raise it below. *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990); *Hopkins* v. *Reeves*, 524 U.S. 88, 94 n.3 (1998) ("Because the State raised this [*Teague*] argument for the first time in its petition for a writ of certiorari, we choose to decide the case on its merits.").

Here, respondent had every opportunity to raise *Teague* (or retroactivity issues) below, since Virginia has adopted the *Teague* analysis for state habeas proceedings. See *Mueller* v. *Murray*, 478 S.E.2d 542, 544 (Va. 1996). But respondent never asserted that *Teague* prevented adjudication of the Vienna Convention claims. Nor did it make that argument under the more general rubric of non-retroactivity. Having failed to raise the issue in state court, respondent may not raise those arguments for the first time here. *Hopkins*, 524 U.S. at 94 n.3; *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999); *Kentucky* v. *Stincer*, 482 U.S. 730, 747 n.22 (1987).

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such relief in 80 years. See *Ex parte Grossman*, 267 U.S. 87 (1925); see also Robert L. Stern *et al.*, *Supreme Court Practice* 591 (8th ed. 2002).

In fact, Virginia's procedural default rules would have blocked respondent from belatedly raising the *Teague* argument in the Supreme Court of Virginia. Respondent never raised *Teague* in the circuit court, see Va. S. Ct. R. 5:25 (requiring objections to be raised in trial court), and never raised it in opposition to the petition for appeal in the Virginia Supreme Court, Va. S. Ct. R. 5:18(b) ("[N]o cross-error not then assigned [in opposition to a petition for appeal] will be noticed by this Court."). Accordingly, and ironically, respondent's attempt to raise *Teague* here is barred by an independent state ground.

C. The Violation Of Petitioner's Vienna Convention Rights Was Not "Harmless Error"

Finally, respondent argues that this Court should not resolve the concededly important Vienna Convention issues here because the violation of petitioner's Vienna Convention rights was "harmless." Br. in Opp. 17-23. But that argument was not addressed by the state courts, which refused relief based on procedural default alone. Moreover, the violation was anything but harmless. As explained in the petition (at 22-25), it resulted in the conviction of an innocent Honduran national for a murder committed by another Honduran national—who had fled to Honduras the day after the victim's death and who has been videotaped bragging that he committed the offense.

Respondent's contrary argument consists of examining three pieces of evidence petitioner likely could have obtained before trial absent the Vienna Convention violation and suggesting that, taken individually, those pieces of evidence "would not have altered the outcome." Br. in Opp. 18, 21-23. But petitioner at most is required to make "*some* showing that the [Vienna Convention] violation *had an effect* on the trial." *Breard* v. *Greene*, 523 U.S. 371, 377 (1998) (emphasis added); see *Torres* v. *State*, No. PCD-2004-442, 2005 WL 2130195, at *1 & n.6 (Okla. Crim. App. Sept. 6, 2005) (collecting cases that find prejudice if the Consulate would have provided evidence for use at trial). Here, obtaining the Honduran Government's assistance would have had a substantial impact on the trial and its outcome.

Petitioner's defense, after all, was that *another Honduran national*, known as "Sirena," had committed the crime, and that Sirena *fled to Honduras* the day after the victim died. Pet. 6. Petitioner, however, had difficulty obtaining evidence corroborating Sirena's existence, much less his flight to Honduras. Pet. App. 12a n.38. Absent the violation of petitioner's Vienna Convention rights, the Honduran Consulate would have provided precisely the corroboration of Sirena's existence and flight that petitioner needed. Pet. 23-24. Standing alone, that evidence would have significantly impacted the trial, because it would have elevated the debate from whether Sirena even existed—an issue the prosecution contested in its closing argument, Pet. 23—to who killed James Merry.

Respondent, for its part, does not deny that the Honduran Consulate would have provided official immigration records conclusively showing that Sirena fled to Honduras just after Merry's death. Instead, respondent claims that such proof would have been immaterial. Br. in Opp. 21-22. But that assertion is belied by the prosecution's closing argument, which focused specifically on whether there was reliable proof that "this so-called Sirena" even existed or "was on the plane" to Honduras as one witness testified. 3/19/98 Tr. 20-21, 75; Pet. 6-7. If that information was immaterial, it is hard to see why the prosecution would have undertaken such a specific (and ultimately mistaken) refutation.

Respondent also claims that no jury would believe the "parade of obviously biased gang members" who, when confronted with the picture of Sirena provided by the Honduran Government after trial, identified him as the person who killed James Merry. Br. in Opp. 18. But credibility issues are for the jury. The Commonwealth's violation of the Vienna Convention foreclosed the jury from making that judgment. Respondent also ignores the closely divided trial testimony. Three witnesses with obstructed views identified petitioner, while two others, with better views, testified that he was not the killer. Under the circumstances, a parade of witnesses identifying the fugitive Sirena as the assailant surely would have raised a reasonable doubt in at least one juror's mind.

Finally, respondent confidently states that "[n]o Virginia court would admit" Sirena's surreptitiously videotaped confession, Br. in Opp. 22, in which he brutally described his crime with self-authenticating detail. See Pet. 8, 24-25. But the only two cases respondent cites for that proposition held that third-party confessions *are* admissible. *Chambers* v. *Mississippi*, 410 U.S. 284, 298-302 (1973); *Hines* v. *Virginia*, 117 S.E. 843, 846-849 (Va. 1923). In short, if ever there were a case in which the Vienna Convention's protections would have made an enormous difference at trial, this is it.

II. Petitioner's *Brady* Claim Is Not Procedurally Barred

Although Virginia rules require that transcripts be filed if they are "*necessary* to permit resolution of appellate issues," Va. S. Ct. R. 5:11(b) (emphasis added), that rule does not foreclose this Court's review of petitioner's federal *Brady* claims. As respondent acknowledges, Br. in Opp. 24, state-law bars do not foreclose this Court's review unless they are both "firmly established and *regularly* followed." *Ford* v. *Georgia*, 498 U.S. 411, 423-424 (1991) (emphasis added). Virginia courts simply do not apply the transcript rule with regularity and predictability. Respondent does not dispute the many instances in which Virginia courts have determined that lower court transcripts are not necessary to permit appellate resolution. Pet. 28-29. At most, respondent has offered several examples where courts have reached contrary results. But that proves only that transcripts are *sometimes* necessary. It does not prove that they were necessary here—particularly given the full transcript of petitioner's criminal trial, the extensive findings of the habeas court, and the purely legal nature of the issues raised on appeal. See Pet. 29.[3]

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[3] Respondent claims that *Wolfe* v. *Virginia*, 371 S.E.2d 314 (Va. App. 1988), proves that appellate review without a transcript is rarely allowed. Br. in Opp. 26. As respondent correctly notes, however, the court there *permitted* appellate review with an incomplete trial record. 371 S.E.2d at 316. Respondent must offer more than the suspect "exception that proves the rule" to divest this Court of jurisdiction. In addition, the record in *Wolfe* did not contain *either* a "trial transcript *or*

Besides, whether *Brady* evidence is material is a *federal* question that, as a matter of *federal* law, can be resolved by comparing the trial record to the *Brady* evidence. Pet. 29-30. Virginia may, in some cases, prefer to conduct that inquiry in light of additional evidence presented in state habeas hearings, but the Commonwealth cannot foreclose review of a federal issue by requiring record materials not necessary to determination of the federal issue. Petitioner must carry his burden to prove materiality without the transcript, but that does not allow the Commonwealth to convert the fundamentally *federal* question of materiality into an issue of *state* law.

Finally, respondent's suggestion that the *Brady* evidence was not material is demonstrably wrong. Petitioner's defense at trial was that another Honduran national, Sirena, swung the fatal blow. The prosecution's response to that defense was to suggest to the jury that "this so-called Sirena" did not exist. The *Brady* evidence establishes that Sirena exists, was at the crime scene, and was seen holding a "cocked" bat near the victim. It shows that the police encountered Sirena near the crime scene shortly after the attack, with red "ketchup" stains on his clothes. It shows that Sirena, when questioned, lied about having been at the murder scene and gave inconsistent statements about where he was coming from. Pet. 25-26. It simply is not credible to say that there is no reasonable probability that the evidence would have led even a single juror to doubt whether petitioner should be convicted of first-degree murder. Respondent blithely assumes that the jury would have resolved all disputes raised by the suppressed *Brady* materials in the Commonwealth's favor. But it was respondent's violation of *Brady* that prevented the jury from actually deciding those issues.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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[a] statement of facts," *ibid.* (emphasis added), whereas here the record includes a complete transcript of petitioner's criminal trial, the *Brady* evidence, and extensive factual findings by the habeas court.

Respectfully submitted.

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No. 05-51

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR *AMICI CURIAE* REPUBLIC OF HONDURAS, ET AL. IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICI CURIAE* REPUBLIC OF HONDURAS, ET AL. IN SUPPORT OF PETITIONER

Amici curiae Republic of Honduras, Argentine Republic, Republic of Bolivia, Republic of El Salvador, United Mexican States, Republic of Paraguay, and Oriental Republic of Uruguay respectfully submit this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF *AMICI CURIAE*

Each *amicus*, as well as the United States, has adopted the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention" or

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties consented in writing to the filing of this brief.

"Convention"). Article 36(1)(b) of the Convention provides that a signatory nation that detains a foreign national must, upon request of the detainee, promptly inform the foreign national's consulate of the detention, and also must advise the detainee of "his rights" under the Convention to consular notification. Article 36(2) of the Convention provides that signatory states must ensure that their laws and regulations allow "full effect" to be given to the protections afforded by the Convention.

In addition, *amici* Argentine Republic, United Mexican States, Republic of Paraguay, and Oriental Republic of Uruguay are signatories to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 586 U.N.T.S. 488 ("Optional Protocol"), as was the United States until recently.[2] The Optional Protocol provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol art. 1, 21 U.S.T. at 325. The International Court of Justice ("ICJ") has issued several decisions interpreting Article 36. In two decisions, it has held that, at least in criminal cases where "severe penalties" have been imposed, judicial remedies for a violation of Article 36 must be available to the individual whose rights under that Article have been violated. In particular, the ICJ has held that (a) Article 36(1)(b) creates individual rights, and (b) under Article 36(2)'s requirement that "full effect" be given to those rights, judicial remedies for violation of those rights cannot be barred by state procedural default rules. *See Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31); *LaGrand Case (F.R.G.* v. *U.S.)*, 2001 I.C.J. 466 (June 27).

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[2] The United States announced its withdrawal from the Optional Protocol on March 7, 2005. Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. Times, Mar. 10, 2005, at A5.

Amici have a vital interest in the Vienna Convention issues raised by the petition for certiorari in this case.[3] Millions of *amici's* citizens reside in the United States, and many more visit the United States every year. Through the consular notification provision of Article 36, the Convention offers important protections to these foreign nationals in the United States. Absent consular notification, detained foreign nationals often lose the benefit of consular assistance in criminal proceedings. This loss, in turn, may limit their ability to mount an effective defense and may even result in a wrongful conviction. Accordingly, United States compliance with the Vienna Convention, and the availability of meaningful remedies in the event of violations, are matters of vital importance to *amici*.

Amici also have broader interests at stake in this petition. *Amici* have a significant interest in both United States compliance with international obligations and its adherence to the interpretations accorded to treaties by international adjudicative bodies, such as the ICJ. This petition provides the Court with an opportunity to reaffirm the United States' commitment to the consular system established by the Vienna Convention and to principles of reciprocity and comity essential to the proper functioning of international law and diplomacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Mario A. Bustillo, a Honduran national, was arrested, tried, and convicted for the first-degree murder of James Merry in the Commonwealth of Virginia. At no point prior to Bustillo's conviction was the Honduran Consulate informed of the proceedings against him, and Bustillo himself was not informed of his rights under the Convention to communicate with the Consulate. There is no dispute that the Commonwealth violated the Convention; the United States has since conceded as much. Bustillo's attempts at

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[3] *Amici* address only the first question raised in the petition and express no view on the two remaining questions presented.

post-conviction relief based on claims under the Vienna Convention, however, have failed. On direct review, the Virginia Court of Appeals affirmed the conviction, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4, 2422-98-4, 2000 WL 36590, at *3 (Va. Ct. App. Apr. 11, 2000), and the Supreme Court of Virginia denied the petition for appeal, *Bustillo* v. *Commonwealth*, No. 001110, slip op. at 1 (Va. Jan. 17, 2001). On state habeas, the Fairfax County Circuit Court found the claim to be procedurally defaulted and the Supreme Court of Virginia denied review. *See* Pet. App. A, F.

As the facts of this case indicate, violations of Article 36 are not infrequent in the United States. Unfortunately, efforts by the State Department to promote greater compliance with Article 36 by local law enforcement authorities have not had any appreciable effect. Unsurprisingly, then, individuals detained in the United States whose rights under Article 36 have been violated have turned to the courts for redress. Thus far, however, those efforts have generally been unsuccessful. Lower courts disagree on whether Article 36 creates individual rights, even though the ICJ has squarely ruled that it does. In addition, in light of a *per curiam* opinion of this Court denying certiorari, *see Breard* v. *Greene*, 523 U.S. 371 (1998), many lower courts have declined to hear claims based on Vienna Convention violations in post-conviction proceedings based on state procedural default rules. These decisions are in conflict with two post-*Breard* decisions of the ICJ, *Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) and *LaGrand Case (F.R.G.* v. *U.S.)*, 2001 I.C.J. 466 (June 27). Those ICJ decisions hold that the Convention creates individual rights, and that (at least in cases involving "severe penalties"), to ensure that such rights be given "full effect," as the Convention requires, parties to the Convention must provide judicial remedies for such violations, notwithstanding procedural default rules.

The conflicts between lower courts in this country and the ICJ warrant this Court's attention. Uniform adherence to the Vienna Convention's consular notification provisions

is of vital importance to *amici*. Moreover, United States adherence to the Convention, as interpreted by the ICJ, will help safeguard the consular system and the values it entails. Such adherence will also protect fundamental tenets of international law, and, in turn, will enhance the potential for treaties to effectuate the shared goals of nations around the world.

Further underscoring the importance of these questions of international law are the dramatic consequences that proper resolution of these issues will have for Petitioner. The violations of the Vienna Convention did not produce only institutional or abstract harms; the violation of Article 36 materially prejudiced Petitioner. Accordingly, the facts of his case both demonstrate the practical importance of the consular notification provisions of the Vienna Convention and amplify the pressing need for this Court's review.

ARGUMENT

I. THE QUESTION OF UNITED STATES OBLIGATIONS UNDER THE VIENNA CONVENTION WARRANTS THIS COURT'S ATTENTION

A. The Vienna Convention Offers Important Protections To *Amici*'s Nationals

Although consular relations have existed since ancient times, the Vienna Convention provided the first true codification of a consular system. Member states enacted the Convention to "contribute to the development of friendly relations among nations, irrespective of their different constitutional and social systems." Vienna Convention, Preamble, 21 U.S.T. at 77. "The unimpeded conduct of consular relations, which have been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring the protection and assistance for aliens resident in the territories of other states." *Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 40 (May 24) ("*Diplomatic and Consular Staff*").

A central component of the consular system established by the Convention is the consular assistance provided to foreign nationals living and traveling abroad. *See* Vienna Convention art. 5 (discussing functions of consulate). The Convention includes particular provisions for consular involvement when authorities detain a foreign national. If the detained national so requests, the receiving state must inform the national's consulate of his detention. *Id.* art. 36. "Any communication addressed to the consular post by the person [arrested must] also be forwarded by the authorities without delay." *Id.* The authorities must inform the person arrested of "his rights" under the Convention, including the right to have his consular post notified of his arrest. *Id.* Consular officers, in turn, have the right to visit a national in prison, "to converse and correspond with him, and to arrange for his legal representation." *Id.* Finally, all of these rights "shall be exercised in conformity with the laws and regulations of the receiving State," but all states' laws and regulations must also enable "full effect" to be given to the purposes for which the rights at issue were created. *Id.*

The protections offered by the Vienna Convention to individual foreign nationals support and complement individual rights recognized by the United States Constitution in the Fifth Amendment right to due process and the Sixth Amendment right to a fair trial, as well as international guarantees of fair criminal procedures recognized in Articles 9 and 14 of the International Covenant of Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 171, to which the United States and *amici* are parties. Because "detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose systems they are not familiar," consular officials provide tangible aid in securing those constitutional rights. Luke Lee, *Consular Law and Practice* 145 (2d ed. 1991) (quoting Dep't of State Telegram 40298 to Embassy Damascus, Feb. 21, 1975). Consular officials can assure that their nationals are represented by competent and culturally sensitive counsel, provide help in securing translation, assist in locating witnesses or documentary evidence available in the foreign

national's home state, and monitor the fairness of the proceedings. This type of assistance ought not be underestimated given the difficulties and disadvantages experienced by many foreign nationals facing criminal proceedings abroad. *Id.*; *see* 7 Foreign Affairs Manual §§ 400-426.2-1 (2004), *available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0.

The United States has long recognized that the Vienna Convention provides vital safeguards to persons imprisoned by a contracting State. In the *Diplomatic and Consular Staff* case, the United States contended:

> [A] principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason, the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations.

Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (*U.S.* v. *Iran*), 1980 I.C.J. Pleadings 174 (Jan. 12); *see also* William J Aceves, Abstract, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 271 (1998) (noting that the United States used the treaty to gain access to two American citizens imprisoned in Syria in 1975). In recognition of the importance of the protections afforded by the Convention, the State Department has gone so far as to assert that "[c]onsular notification ... is a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the [Convention] or from any other applicable bilateral agreement." Dep't of State, *Consular Notification and Access* 44 (1998), *available at* http://www.travel.state.gov/pdf/CNA_book.pdf.

The enforcement of these Vienna Convention protections is of vital importance to *amici*. More than 200,000

Honduran nationals, such as petitioner, live in the United States. *See* Table FBP-1, *Profile of Selected Demographic and Social Characteristics: 2000 (Honduras), available at* http://www.census.gov/population/cen2000/stp-159/stp159-honduras.xls (2000) (last visited Sept. 20, 2005). More than eight million nationals of *amici* nations live in the United States. *See id. (Argentina, Bolivia, El Salvador, Honduras, Mexico).*[4] And still thousands more travel in the United States every year. Compliance by the United States, and, absent compliance, the availability of remedies for violations, are essential if the protections offered by the Vienna Convention are to be meaningful for the many foreign nationals of *amici* nations in the United States.

B. Violations Of The Vienna Convention, And The Treatment Of Claims Of Such Violations By United States Courts, Are Matters Of Continuing Concern To *Amici*

In the United States, violations of Article 36 are an ongoing problem. Recent federal efforts to promote compliance by the States have come up well short. In January 1998, the State Department issued a booklet of guidelines to encourage local law enforcement officers to fulfill their Vienna Convention obligations. *Consular Notification and Access, supra.* But the numerous cases involving allegations of Convention violations suggest that the problem persists. *See, e.g., United States* v. *Gonzales*, 339 F.3d 725, 729 (8th Cir. 2003); *United States* v. *Cazares*, 60 Fed. Appx. 223, 226 (10th Cir. 2003) (unpublished); *United States* v. *Ortiz*, 315 F.3d 873, 881 (8th Cir. 2002); *United States* v. *Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002); *United States* v. *Contreras-Cortez*, 41 Fed. Appx. 252, 255 (10th Cir. 2002) (unpub-

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[4] *Available at* http://www.census.gov/population/cen2000/stp-159/stp159-argentina.xls, http://www.census.gov/population/cen2000/stp-159/stp159-bolivia.xls, http://www.census.gov/population/cen2000/stp-159/stp159-el_salvador.xls, http://www.census.gov/population/cen2000/stp-159/STP-159-Mexico.xls (last visited September 20, 2005). Census data is not available for *amici* Republic of Paraguay and Oriental Republic of Uruguay.

lished); *United States* v. *Guerrero*, 45 Fed. Appx. 265, 266 (4th Cir. 2002) (unpublished); *United States* v. *Felix-Felix*, 275 F.3d 627, 632 (7th Cir. 2001); *United States* v. *Emuegbunam*, 268 F.3d 377, 387 (6th Cir. 2001); *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 983 (10th Cir. 2001); *United States* v. *Beckford*, 2000 U.S. App. LEXIS 6752, at *40 (4th Cir. 2000) (unpublished).

Given the apparent lack of success in the State Department's public education efforts to prevent violations of Article 36, the question whether the United States will provide an effective *judicial* remedy for violations of the individual rights secured by Article 36 is significant and pressing, and is of continuing concern to *amici*. This Court has yet to address that issue in a case granted for plenary review. The closest it has come is its *per curiam* opinion denying certiorari in *Breard* v. *Greene*, 523 U.S. 371 (1998).[5] In that case, the Court did not consider whether the Convention creates individually enforceable rights. Rather, the Court disposed of the case by concluding that Breard had procedurally defaulted his Vienna Convention claim by failing to raise it in state court, and that the application of the procedural default rule in that circumstance appeared consistent with Article 36. *Id.* at 375-376.

At the time of this Court's denial of certiorari in *Breard*, the ICJ had not yet addressed either of these issues.[6] Since

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[5] The Court granted certiorari to address these and related issues last Term in *Medellin* v. *Dretke*, 125 S. Ct. 686 (2004), but did not resolve those issues because of procedural complexities in that case. *See Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005). Those complexities are not present in this case, as the petition for certiorari explains (at 20-21).

[6] Just before this Court's denial of certiorari in *Breard*, the ICJ issued an "order indicating provisional measures" in a case brought by Paraguay (Breard's country of nationality) against the United States, stating that the United States "should take all measures at its disposal to ensure that . . . Breard is not executed pending the final decision in these proceedings." *Vienna Convention of Consular Relations (Paraguay* v. *U.S.)*, 1998 I.C.J. 248, 258 (Apr. 9) (Provisional Measures Order). That order by the ICJ, however, did not resolve the merits of the controversy

Breard, the ICJ, the body charged by signatories to the Optional Protocol with interpreting the Vienna Convention, has issued decisions regarding the remedies available for such violations. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27). As noted above, in *Avena* and *LaGrand*, the ICJ ruled that the Convention creates individually enforceable rights and that judicial redress for violations of those rights may not be barred by state procedural default rules.

Courts in this country faced with claims under the Vienna Convention have issued decisions in conflict with one another and with the rulings of the ICJ. Notwithstanding this Court's recognition that "respectful consideration" must be given to the ICJ's interpretation of the Convention as well as the absence of a decision of this Court on point, several lower courts have ruled that the Convention creates no individually enforceable right. *See, e.g., Cardenas* v. *Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *Emuegbunam*, 268 F.3d at 394; *State* v. *Sanchez-Llamas*, 108 P.3d 573, 578 (Or. 2005), *pet'n for cert. filed* (No. 04-10566, June 7, 2005); *State* v. *Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *Gomez* v. *Commonwealth*, 152 S.W.3d 238, 242 (Ky. Ct. App. 2004). Other courts have adhered to the ICJ's interpretation on this front. *See, e.g., Standt* v. *City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States* v. *Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States* v. *Hongla-Yamche*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999). And some have declined to decide the question. *See, e.g., United States* v. *De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001); *United States* v. *Li*, 206 F.3d 56, 60 (1st Cir. 2000) (*en*

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between Paraguay and the United States but merely sought to preserve the ICJ's jurisdiction over that dispute. Moreover, the Solicitor General advised this Court in *Breard* that the ICJ's order indicating provisional measures was not binding but was precatory—a position later repudiated by the ICJ in the *Germany* case. U.S. *Amicus* Br. 49-50 (Nos. 97-1390 & 97-8214, *Paraguay* v. *Gilmore* and *Breard* v. *Greene*).

banc); *Conde* v. *State*, 860 So. 2d 930, 953 (Fla. 2003). Even where courts have found (or assumed) individually enforceable rights, they have held, contrary to the ICJ but consistent with *Breard*, that such claims can be procedurally defaulted under state law.[7]

The conflicts among the lower state and federal courts provide reason enough for this Court's review. This Court has a unique responsibility to ensure the uniform interpretation of federal laws. *See Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-348 (1816) (recognizing "the importance, and even necessity of *uniformity* of decisions throughout the whole United States"). But in addition, uniformity is at a premium in the context of treaty interpretation because of the consequences for foreign affairs. *See, e.g., Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 337-338 (5th Cir. 1967). When nations such as *amici* treat with the United States on important matters such as the right to consular notification, it is essential that they have assurance that the United States will be able to ensure compliance with its treaty obligations by all organs of the government. From the perspective of nations such as *amici*, conflicting judicial decisions on the application and interpretation of a treaty undermine this assurance.

In addition, and of critical importance here, nations that enter into treaties with the United States necessarily rely on the United States government's assurance that States and local governments will comply with their treaty obligations. No less than the federal government, States and localities are bound by treaties to which the United States is a

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[7] Because the Court's decision in *Breard* was a *per curiam* opinion denying a writ of certiorari, it is not entitled to the same precedential weight as an opinion rendered upon this Court's plenary consideration. *See Teague* v. *Lane*, 489 U.S. 288, 296 (1989) ("The variety of considerations [that] underlie denials of the writ counsels against according denials of certiorari any precedential value. Concomitantly, opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits." (citations omitted)).

signatory. *See* U.S. Const. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]"). Indeed, in the very first decision of this Court that exercised the power of judicial review to invalidate legislation, this Court ruled that a treaty prevailed over conflicting state law. Because "[a] treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way," courts are under a "declared duty ... to determine any Constitution, or laws of any State, contrary to [a treaty] made under the authority of the United States, null and void." *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796).

While *amici* fully appreciate the complexities of the federal system of government established by the United States Constitution, they also look to the Supremacy Clause's assurance that treaties are binding throughout the United States when they enter into treaties with the United States. This Court's frequent observation that the United States must speak with "one voice" on matters of foreign affairs, *see, e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003); *United States* v. *Pink*, 315 U.S. 203, 242 (1942), daily guides nations such as *amici* in their dealings with the United States government. Accordingly, this Court should grant certiorari to bring clarity and consistency to the United States position on this issue of great consequence for international relations.

C. Fundamental Principles Of International Law Require That Domestic Courts Offer Remedies, Consistent With The ICJ's Interpretation, For Violations Of The Vienna Convention

The failure of courts in this country to provide remedies for Convention violations as required by the ICJ also warrants this Court's attention. This Court's review is needed to reaffirm the United States' commitment to the Vienna Convention and to the principles of reciprocity and comity that are the bedrock of international law.

This Court has long recognized the importance of treaties in the United States' affairs with other nations. *See Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains); *see generally Restatement (Third) of Foreign Relations Law* § 102(1)(b) & cmt. f (1990). In the absence of predictable compliance by all nations, treaties would become mere expressive instruments that could not support orderly and effective state-to-state relations. "'A decent respect for the opinions of mankind,' national honor, harmonious relations between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed." *United States* v. *Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927).

This Court's recognition of the importance of treaties reflects the fundamental importance of reciprocity in international relations. "International law is found upon mutuality and reciprocity," *Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895), and "[w]hat is law for one, is under the same circumstances, law for the other," *United States* v. *Arjona*, 120 U.S. 479, 487 (1887). For the treaty system to work, nations must follow the cardinal rule that treaties must be enforced—*pacta sunt servanda*. *See Restatement (Third) of Foreign Relations Law* § 321 cmt. a (1990). "The doctrine of *pacta sunt servanda* . . . lies at the core of the law of international agreements and is perhaps the most important principle of international law. It includes the implication that international obligations survive restrictions imposed by domestic law." *Id.*

Highlighting the reciprocal nature of Vienna Convention treaty obligations, then-State Department Legal Adviser William H. Taft IV recently remarked that it is both "right and fair" that we comply with our obligations under the treaty. Dep't of State Legal Adviser William H. Taft IV, Remarks to the National Association of Attorneys General (Mar. 20, 2003), *available at* http://usinfo.state.gov/dhr/

Archive/2003/Oct/09-464655.html. The State Department's instructions to local authorities make clear the importance of reciprocity, noting that adherence to the treaty "will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad." *Consular Notification and Access*, *supra*, at 13.

As noted, the ICJ has issued decisions interpreting the Vienna Convention and defining the obligations of the United States under that treaty. In *Breard*, the Court observed that no international court had yet interpreted the treaty, and that this Court "should give respectful consideration" to such an interpretation. 523 U.S. at 375. Indeed, the United States has often acknowledged the importance of international courts in resolving treaty disputes. For example, the United States turned to the International Court of Justice ("ICJ") for adjudication of its own Vienna Convention claims in the aftermath of the Tehran hostage crisis. *See Diplomatic and Consular Staff*, *supra*. And each Member of the United Nations undertakes to comply with the decisions of the ICJ in cases to which it is a party. United Nations Charter art. 94, Aug. 8, 1945, 59 Stat. 1031, 3 Bevans 1179.

Because of the important role of treaties in international relations and the significance of the interpretation of treaties by bodies such as the ICJ, this Court should grant certiorari to resolve the apparent conflict between, on the one hand, lower court decisions following *Breard*, and, on the other hand, the holdings of the ICJ in *Avena* and *LaGrand*. The United States adherence to the Convention as interpreted by the ICJ has ramifications not only for the consular system established by the Convention, but also for international relations more generally. This petition presents the Court with an opportunity to reaffirm the United States' commitment to the rule of law in general and to such fundamental principles of international law as reciprocity and comity. In so doing, the Court will not only safeguard the consular sys-

tem, but also will promote the proper functioning of international relations and diplomacy to the benefit of nations and individuals around the world.

II. PETITIONER WAS MATERIALLY PREJUDICED BY VIRGINIA LAW ENFORCEMENT'S FAILURE TO COMPLY WITH THE VIENNA CONVENTION

The importance of the questions of treaty interpretation and international law presented in the petition for certiorari are amplified by the facts of this case. Proper resolution of the question presented would have dramatic consequences for Bustillo. The violation of Article 36 substantially prejudiced Bustillo, as a review of the events and facts of his case makes readily apparent. Indeed, Bustillo's conviction showcases the practical importance to individual foreign nationals of the consular notification provisions established by the Vienna Convention. In the face of this severe prejudice, the state court's error in interpreting the Vienna Convention looms especially large.

At Bustillo's trial, the theory of his defense was that another individual known as "Sirena" (now known to be Julio Osorto), a citizen of Honduras like Bustillo, had been the one to strike and kill the victim outside of a Popeye's restaurant in Springfield, Virginia. The trial came down to the testimony of five witnesses, three testifying that Bustillo was the killer and two saying that Bustillo was not the killer (one of whom identified Sirena as the killer). A defense witness also testified that Sirena had fled to Honduras after the killing and specified the date and flight of Sirena's departure from the U.S. At the time of trial, the defense could not locate Sirena and was not even able to tell the jury Sirena's full name. In light of the lack of additional corroborating evidence for this theory, the prosecution mocked both the defense theory and the defense witnesses' credibility. *See* Pet. 2, 6-7.

Since the trial, Sirena's full name has been determined. And, according to immigration records, Sirena had in fact fled to Honduras after the victim died. Sirena has also been located and, in secretly videotaped conversations, has admit-

ted to striking the victim with a baseball bat. In addition, police reports that have come to light since the trial establish that police stopped Sirena after the crime near where the victim had been bludgeoned with a baseball bat, that Sirena had red stains on his clothes, that he falsely told police he had not been at Popeye's on the night in question (contrary to the Commonwealth's own witnesses), that he gave multiple conflicting stories to police about his whereabouts, and that another witness saw Sirena cock a bat to strike the victim.

As noted above, the Honduran Consulate was not advised of the proceedings against Bustillo until after the trial was complete. After receiving notice, the Consulate submitted a declaration stating that, if it had been notified of Bustillo's case and made aware that the defense believed *another Honduran national* had committed the crime and that a defense witness had provided information pertinent to Sirena's flight to Honduras at trial, it would have provided assistance. Specifically, at the least, the Consulate would have (1) supplied immigration records showing that Sirena entered Honduras the day after the victim died, in conformity with the testimony of the defense witness as to Sirena's flight, (2) provided a photograph of Sirena, and (3) attempted to contact and interview Sirena to assist Bustillo. *See* Habeas Pet. Exs. 26, 26a, 26b.

This assistance would have substantially strengthened the defense case. Most directly, it would have lent credibility and support to the theory of the defense; the defense would have been able to tell the jury Sirena's real name and provide proof of his flight to Honduras immediately following the crime. This evidence would have preempted the prosecution's tactic of mocking the defense's theory of the case and its suggestion that the theory was a fabrication because there was so little corroborating evidence. Moreover, if the Honduran consular officials had known of the situation facing Bustillo and had been able to lend assistance in advance of trial, the very heart of the prosecution's case—witnesses identifying Bustillo as the killer—would have

been undermined. The police showed witnesses Bustillo's photo only. Sirena's photo, ultimately provided by the Honduran consulate, led several witnesses to identify Sirena as the individual who struck the victim. Habeas Pet. Exs. 16, 21, 28, 29, 32. Accordingly, it is quite probable that consular assistance would have caused the trial to come out differently.

In addition, given that habeas counsel, unaided by authorities, was able to secretly secure a self-authenticating confession from Sirena, it seems likely that the Consulate would have been able to provide *some* additional evidence to support Bustillo's case. Speculation as to the types of evidence that would have been available to Bustillo, while it shows the extent of the prejudice and the value of consular assistance, is ultimately unnecessary; even just assuming the photograph and immigration records would have been provided, the substantial prejudice to Bustillo is readily apparent.

The prejudice to Bustillo from the violation of the Convention adds special urgency to the question presented. The prejudice distinguishes this petition from that in *Breard*, where, as the Court observed, "no such showing [of prejudice] could even arguably be made." *Breard*, 523 U.S. at 377.[8] Because of the prejudice, and the corresponding potential consequences of this Court's review for Bustillo, consideration of the question presented ought not be put off until a future case.

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[8] Similarly, in *Medellin*, the Court labeled the lack of prejudice, as evident from a lower court ruling on the question, the "most important[]" obstacle to habeas relief. 125 S. Ct. at 2091.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI FILED – JULY 5, 2005
PETITION FOR A WRIT OF CERTIORARI GRANTED – NOVEMBER 7, 2005

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IN THE
SUPREME COURT OF VIRGINIA

Case No. 042023

MARIO A. BUSTILLO,

PETITIONER,

v.

GENE M. JOHNSON, DIRECTOR OF THE
VIRGINIA DEPARTMENT OF CORRECTIONS,

RESPONDENT.

HABEAS APPEAL

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/30/04	Record Received
09/03/04	Petition for Appeal Received
11/12/04	Brief in Opposition Received
02/16/05	Panel Date
03/07/05	Disposition Date Disposition: DISMISSED

IN THE
CIRCUIT COURT OF FAIRFAX COUNTY

Case No. Law 201879
Habeas Corpus
Rule 5:13

MARIO A. BUSTILLO

V.

VIRGINIA DEPT. OF CORRECTIONS, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
2/6/02	1-66	Petition for a Writ of Habeas Corpus Ad Subjiciendum
2/6/02	67	Motion for Leave to Proceed in Forma Pauperis
2/6/02	68-69	Praecipe with Affidavit
	70-126	Translation Cover [Ex. 10] dated 2/27/99 with attached petition
2/6/02	127	Order * * * Judge Michael P. McWeeny[1]
2/21/02	128	Order * * * Judge Henry E. Hudson

[1] All asterisks in the Relevant Docket Entries appear in the original docket sheets.

DATE	NO.	PROCEEDINGS
3/4/02	129-130	Letter from Attorney Kiyonaga dated 3/1/02 with attached letter from National Commissioner of Human Rights, Honduras
4/2/02	131-132	Motion
4/3/02	133-134	Order * * * Judge Henry E. Hudson
4/29/02	135-157	Brief Amicus Curiae of the Embassy of Honduras in Support of Mario Bustillo
5/3/02	158-159	Addendum to Petition for Writ of Habeas Corpus
5/6/02	160	Amended Certificate of Service
5/6/02	161-253	Motion to Dismiss with attached exhibits
5/13/02	254	Motion for Leave to Amend Petition
5/14/02	255-266	Petitioner's Reply to Motion to Dismiss
5/14/02	267-269	Petitioner's Motion to Admit Polygraph Examination Results with attachment
5/16/02	270-271	Objection to Brief Amicus Curiae
5/17/02	272-276	Respondent's Opposition to Petitioner's Motion for Leave to Amend
5/28/02	277-281	Reply to Respondent's Objections to Brief Amicus Curiae
6/6/02	282-284	Motion for Permission for Foreign Attorney to Appeal (John Anthony Smith, Esq.)
8/8/02	285-293	Order with Memorandum Opinion * * * Judge Henry E. Hudson

DATE	NO.	PROCEEDINGS
8/21/02	294	Friday Motions Day – Praecipe/ Notice
8/21/02	295	Notice of Motion
8/21/02	296-297	Praecipe
8/21/02	298-303	Petitioner's Motion to Compel Discovery with attachment
	304	Letter dated 8/21/02 to Judge Hudson from Kiyonaga
8/22/02	305-308	Response to Motion for Discovery
8/22/02	310-317	Motion for Clarification with attachments
8/22/02	318-319	Affidavit
8/27/02	320-321	Letter to Counsel from Judge Michael P. McWeeny
8/27/02	322-323	Petitioner's Response to Respondent's Motion for Clarification
9/4/02	324-333	Notice with attached copy of motion
9/5/02	334	Friday Motions Day – Praecipe/ Notice
9/5/02	335	Notice and Motion
9/5/02	336	Friday Motions Day – Praecipe/ Notice
9/5/02	337-341	Notice and Motion with attachment
9/7/02	342-344	Response to Petitioner's Motion to Admit Polygraph Examination Results
9/18/02	345-347	Petitioner's Memorandum in Support of his Motion to Compel Discovery

DATE	NO.	PROCEEDINGS
10/3/02	348-350	Order * * * Judge R. Terrence Ney
10/3/02	351-352	Order Amending Memorandum Opinion * * * Judge R. Terrence Ney
10/17/02	353	Calendar Control Form
10/25/02	354	Friday Motions Day – Praecipe/ Notice
10/25/02	355	Notice and Motion
10/25/02	356-374	Petitioner's Motion for Sanctions with attached exhibits
11/1/02	375-401	Response to Petitioner's Motion for Sanctions and Request for In Camera Review with attachments
	402-404	Letter, Asst. Attorney General Shaffer to Kiyonaga with attachments, dated 11/4/02
11/15/02	405	Order * * * Judge R. Terrence Ney
	406-407	Letter to Mr. Kiyonaga from Asst. Attorney General Shaffer dated 11/20/02
11/22/02	408-409	Motion
11/25/02	410-411	Order * * * Judge R. Terrence Ney
11/26/02	412-413	Letter, Shaffer to Kiyonaga, dated 11/22/02
11/26/02	414-415	Letter, Shaffer to Kiyonaga, dated 11/20/02
11/26/02	416	Order * * * Judge R. Terrence Ney
12/4/02	417-449	Transcript taken 11/15/02 before Judge R. Terrence Ney

DATE	NO.	PROCEEDINGS
1/9/03	450-452	Letter, Shaffer to Mr. Frey, dated 1/8/03 with attached invoice
1/9/03	453-459	Transcript (Partial) taken 12/5/02 before Judge R. Terrence Ney
1/24/03	460-461	Order * * * Judge R. Terrence Ney
/6/03	462-465	Copy of 1/8/03 letter, Shaffer to Mr. Frey with handwritten notes affixed
2/13/03	466-467	Order * * * Judge R. Terrence Ney
2/21/03	468-470	Final Order * * * Judge R. Terrence Ney
3/13/03	471	Suspending Order * * * Judge R. Terrence Ney
3/25/03	472-474	Respondent's Opposition to Petitioner's Motion for Leave to Amend
4/1/03	475-477	Respondent's Opposition to Petitioner's Motion Further to Amend Petition
8/7/03	478-479	Praecipe (Embassy)
9/16/03	480-492	Order with Opinion Letter *** Judge R. Terrence Ney
9/29/03	493-496	Praecipe (Embassy) with attachment
10/20/03	497-499	Praecipe (Embassy)
12/22/03	500	Calendar Control Form
Original filed 3/5/04	501-503	Petitioner's Motion to Preclude Evidence (*Copy-original is missing from file*)
3/9/04	504-506	Response to Petitioner's Motion to "Preclude Respondent Evidence"

DATE	NO.	PROCEEDINGS
3/17/04	507	Order * * * Judge R. Terrence Ney (*Certified Copy-original is missing from file*)
3/18/04	508-509	Order * * * Judge R. Terrence Ney (*Certified Copy-original is missing from file*)
3/22/04	510-524	Letter dated 3/22/04 to Judge Ney from Kiyonaga with attachments
3/23/04	525	Calendar Control Form
Original filed 3/23/04	526-528	Letter dated 3/23/04 to Judge Ney from Kiyonaga with notice and Motion, and Petitioner's Motion for Clarification (*Copy-original is missing from file*)
3/23/04	529	Order * * * Judge R. Terrence Ney
	530	Petitioner's Motion to Quash Subpoena Duces Tecum (Copy)
3/29/04	531-532	Order * * * Judge R. Terrence Ney
3/30/04	533-536	Fax of Letter and Response to Petitioner's Motion to Quash Subpoena
Original filed 3/31/04	537-538	Response to Petitioner's Motion to Quash Subpoena (*Copy-original is missing from file*)
	539-550	Letter to court dated 4/1/04 from Emily Hargrove with attached Praecipe and Motion to Supplement Brief Amicus Curiae in Support of Mario Bustillo (Copies)
4/9/04	551-553	Petitioner's Motion to Keep Record Open

DATE	NO.	PROCEEDINGS
Original filed 4/12/04	554-556	Response to Petitioner's Motion to Keep the Record Open (*Copy-original is missing from file*)
5/4/04	557-567	Final Order with Opinion Letter * * * Judge R. Terrence Ney
5/21/04	568	Notice of Appeal (Petitioner)
7/15/04	569-570	Notice of Filing of Transcripts
7/15/04	Separate	Transcript taken 12/5/02 before Judge R. Terrence Ney
7/15/04	Separate	Transcript taken 4/7/04 before Judge R. Terrence Ney
	In file	Exhibits

IN THE
SUPREME COURT OF VIRGINIA

Case No. 001110

MARIO A. BUSTILLO,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR APPEAL

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
05/15/00	Petition for Appeal Received
06/05/00	Brief in Opposition Received
06/07/00	Record Received
12/13/00	Panel Date
01/17/01	Disposition Date Disposition: REFUSED

IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 2422-98-4

MARIO A. BUSTILLO,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/13/98	1	Amended notice of appeal
10/23/98	3	Faxed notice of appeal from trial court
11/5/98		Record from trial court
		Manuscript (1 vol.) Transcript (7 vols.) Exhibits (1 vol.)
		Presentence report in record (sealed)
	12	Notice acknowledging receipt of record, dated November 5, 1998
11/10/98	13	Motion for enlargement of time
	15	Order entered on December 2, 1998
1/4/99		Petition for appeal (1 vol.)
1/5/99		Replacement petition for appeal (1 vol.)

DATE	NO.	PROCEEDINGS
1/28/99	16	Brief in opposition
3/8/99	39	Appellant's motion to remand
3/17/99	48	Objection to appellant's motion to remand
3/18/99	51	Appellant's motion to remand
3/24/99	54	Reply to objection to appellant's motion to remand
	70	Order entered on June 1, 1999
6/17/99	85	Letter from appellant's counsel to Clerk's Office, dated June 15, 1999
	88	Order entered on September 29, 1999
10/18/99	90	Appellant's designation and question to be presented
10/27/99		Additional document from trial court (1 vol.)
11/8/99		Opening brief of appellant (1 vol.)
11/8/99		Appendix (1 vol.)
12/2/99	93	Motion to extend time for filing Commonwealth's brief
	96	Order entered on December 3, 1999
12/13/99		Brief for the Commonwealth (1 vol.)

DATE	NO.	PROCEEDINGS
12/27/99		Reply brief of appellant (1 vol.)
	97	Opinion rendered on April 11, 2000
	104	Order entered on April 11, 2000
4/25/00	105	Notice of appeal to the Supreme Court

IN THE
COURT OF APPEALS OF VIRGINIA

Record No. 2321-98-4

MARIO A. BUSTILLO,

APPELLANT,

v.

COMMONWEALTH OF VIRGINIA,

APPELLEE.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/9/98	1	Notice of appeal
	3	Letter from Clerk's Office to appellant's counsel, dated October 9, 1998
10/23/98	4	Faxed sentencing order entered on July 24, 1998
11/5/98		Record from trial court (Shares with 2422-98-2) Manuscript (1 vol.) Transcript (7 vols.) Exhibits (1 vol.) Presentence report in record (sealed)
	13	Notice acknowledging receipt of record, dated November 5, 1998
11/19/98	14	Motion for enlargement of time
	18	Order entered on December 2, 1998

DATE	NO.	PROCEEDINGS
12/7/98	19	Letter from appellant's counsel to Clerk's Office, dated December 3, 1998
1/4/99		Petition for appeal (1 vol.)
1/4/99		Replacement petition for appeal (1 vol.)
1/5/99	20	Addendum to petition for appeal
1/28/99	21	Brief in opposition
	44	Order entered on June 1, 1999
6/17/99	52	Letter from appellant's counsel to Clerk's Office, dated June 15, 1999
	55	Order entered on September 29, 1999
10/13/99	57	Letter from appellee's counsel to appellant's counsel, dated October 13, 1999
10/18/99	58	Appellant's designation and question to be presented
10/27/99		Additional document from trial court (1 vol.)
11/8/99		Opening brief of appellant (1 vol.)
11/8/99		Appendix (1 vol.)
12/2/99	61	Motion for enlargement of time
	64	Order entered on December 3, 1999
12/13/99		Brief for the Commonwealth (1 vol.)
12/27/99		Reply brief of appellant (1 vol.)
12/27/99	65	Letter from appellee's counsel to appellant's counsel, dated December 27, 1999

DATE	NO.	PROCEEDINGS
2/7/00	67	Letter from appellant's counsel to Clerk's office, dated February 2, 2000
	68	Opinion rendered on April 11, 2000
	75	Order entered on April 11, 2000
4/11/00	76	Letter from appellant's counsel to Clerk's Office, dated April 7, 2000
4/17/00	77	Notice of appeal to the Supreme Court
4/17/00	78	Notice of appeal to the Supreme Court

IN THE
CIRCUIT COURT OF FAIRFAX COUNTY

Case No. CR-93337
Rule 5:3 and 5A:19

MARIO A. BUSTILLO

v.

VIRGINIA DEPT. OF CORRECTIONS, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/17/97	1	Warrant of Arrest
12/17/97	2	Commitment Order
	3	Information on Attorney
12/18/97	4-7	Notice of Hearing and Motion with Attachments
12/18/97	8	Notice to the Jail
	9	Motion/Bond Reduction
12/19/97	10	Order * * * Judge Dennis J. Smith[1]
12/29/97	11	Notice to the Jail
12/31/97	12	Certification Request
1/7/98	13	Request for Continuance

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[1] All asterisks in the Relevant Docket Entries appear in the original docket sheets.

DATE	NO.	PROCEEDINGS
1/20/98	14	Indictment for Murder
3/6/98	15	Order * * * Judge Bach
3/9/98	16-84	Letter to Mr. Bernhard from Todd Sanders with Attachments
3/9/98	85-86	Notice of Intention to Present Evidence of Alibi
3/9/98	87-88	Discovery and Inspection Order * * * Judge Bach
3/17/98	89-91	Jury List * * * SEALED By Order of Judge Lee
3/18/98	92	Commonwealth's Motion in Limine
3/19/98		Commonwealth's Jury Instructions
3/19/98	93-94	No. 2 Given
3/19/98	95	No. 3 Given
3/19/98	96	No. 4 Given
3/19/98	97	No. 5 Given
3/19/98	98	No. 6 Given
3/19/98	99	No. 7 Refused
3/19/98	100	No. 8 Given
3/19/98		Defendant's Jury Instructions
3/19/98	101-109	No. A-I Given
3/19/98	110	No. J Denied
3/19/98	111-112	No. K Denied
3/19/98	113	No. L Denied

3/19/98	114	No. M Given
3/19/98	115	Jury Question
	116-117	Jury Verdict Forms
	118	Jury Verdict
	119	Jury Verdict
4/6/98	120-121	Jury Trial Order (Day 1) * * * Judge Lee
4/7/98	122-123	Jury Trial Order (Day 2) * * * Judge Lee
4/7/98	124-125	Jury Trial Order (Day 3) * * * Judge Lee
4/7/98	126-127	Jury Trial Order (Day 4) * * * Judge Lee
4/9/98	128	Letter Dated March 16, 1998 to Mr. Bernhard from Todd Sanders
4/9/98	129	Letter to Mr. Bernhard from Todd Sanders
5/7/98	130	Order of Substitution * * * Judge Lee
6/9/98	131-147	Presentence Investigation Report
6/12/98	148	Praecipe/Notice
6/12/98	149	Notice of Motion
6/12/98	150-161	Defendant's Motion to Set Aside Verdict
6/15/98	162-168	Addendum to Defendant's Motion to Set Aside Verdict with Attachments
6/16/98	169	Order of Substitution * * * Judge Lee
6/29/98	170	Order * * * Judge Lee

6/29/98	171	Order * * * Judge Lee
7/13/98	172-191	Commonwealth's Exhibits in Opposition to Defendant's Motion to Set Aside Verdict
7/13/98	192-197	Commonwealth's Memorandum in Opposition to Set Aside the Verdict
7/17/98	198-201	Sentencing Guidelines
7/17/98	202	Order for Withdrawal of Blood * * * GBL
7/24/98	203-204	Sentencing Order * * * Judge Lee
7/28/98	205	Letter to Judge Lee from Todd Sanders
8/3/98	206-207	Order * * * Judge Lee
8/7/98	208	Praecipe/Notice
8/7/98	209-214	Defendant's Renewed Motion to Set Aside Verdict
8/14/98	215	Order * * * Judge Thacher
8/14/98	216	Defendant's Motion to Suspend Execution
9/4/98	217-219	Commonwealth's Affidavits in Response to Defendant's Second Motion to Set Aside Verdict
9/11/98	220-223	Defendant's Reply to Commonwealth's Submission with Attachments
9/14/98	224-226	Commonwealth's Supplemental Affidavit in Response to Defendant's Second Motion to Set Aside Verdict with Attachments
9/15/98	227-230	Addendum to Defendant's Reply to Commonwealth's Submission with Attachments

10/1/98	231	Addendum to Defendant's Reply to Commonwealth's Submission
10/2/98	232-233	Addendum to Defendant's Reply to Commonwealth's Submission
10/7/98	234-239	Opinion Letter * * * Judge Lee
10/7/98	240-242	Notice of Appeal with Receipt Attached
10/8/98	243	Letter to Clerk from Counsel Kiyonga
10/8/98	244	Final Order * * * Judge Lee
10/8/98	245-246	Amended Notice of Appeal

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Criminal No. 93337

COMMONWEALTH OF VIRGINIA

v.

MARIO BUSTILLO,
Defendant.

March 19, 1998

Appearances:

On Behalf of the Commonwealth:

TODD SANDERS, ESQUIRE

Asst. Commonwealth's Attorney

On Behalf of the Defendant:

DAVID BERNHARD, ESQUIRE

* * * * *

[11] * * * Mr. Sanders: Thank you, Your Honor. Members of the Jury, I would like to briefly thank you for your time and attention in this case.

* * * * *

[20] This whole Sirena thing, I don't want to dwell on it too much. It's very convenient that Mr. Sirena apparently isn't available. There was a witness called; a Ms. Ulma. She's on a plane going to Honduras seven days later and she sees Sirena on the plane. Of course, the inference he wants you to believe is that he's fleeing from this offense. Well, even if he was on that plane, that's seven days later.

Someone else has already been arrested and identified by everybody. That's if he was on the plane. She still doesn't know his full name. Amaya doesn't know the full name. The plane tickets you have are for that witness, not for this Sirena. I submit [21] that's just a red herring. It's very convenient to have that at this point, in March of 1998, to be able to say that.

* * * * *

[75] * * * There was testimony from the person that was supposedly on this plane about this Sirena. I don't want to comment too much on that, but I'm not really clear. How did she end up sitting there testifying? How did Mr. Amaya? Counsel will tell you, well, if he was in this gang, suggests that they'd be here. If Sirena really did this—this so called Sirena—who's now in Honduras, and there's no doubt that this Defendant was in that gang, they'd all be here telling you that. He called one person who, I submit, was not credible. That one person said that he's not even in the gang.

* * * * *

Commonwealth of Virginia

COUNTY OF FAIRFAX

4110 CHAIN BRIDGE ROAD, ROOM 123
FAIRFAX, VIRGINIA 22030-4047

[date stamp]

ROBERT F. HORAN, JR.
COMMONWEALTH'S ATTORNEY
RAYMOND F. MORROGH
DEPUTY COMMONWEALTH'S ATTORNEY
703-246-2776

RAYMOND L. BROWNELLE
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JULIUS ROTHSTEIN
TONI L. STEVENS
LORI B. DIGIOSIA
IAN M. RODWAY
WILLIAM T. ROOTS, JR.
WILLIAM E. FITZPATRICK
JOHN F. CARROLL
DOUGLAS R. KAY
LAURA F. HERING
ASSISTANTS

March 9, 1998

HAND-DELIVERED

David Bernhard, Esq.
Bernhard & Gardner
6105-D Arlington Blvd.
Falls Church, Va. 22044

Re: Commonwealth v. Mario Bustillo
Criminal No. 93337

Dear Mr. Bernhard:

Enclosed please find the following documents (67 total pages):

1. Report of autopsy
2. Medical records
3. Copy of photo array
4. Copies of crime scene photos, defendant and victim
5. Copy of Miranda form
6. Defendant's NCIC record

Ex. 1

Originals of the pictures may be examined at your convenience. Additional pictures and diagrams may be obtained prior to trial and will be provided if and when they become available. Two baseball bats were recovered at the scene and are available for your inspection at your convenience. No latent fingerprints or blood were found on the bats. The defendant's clothes were also collected and are available for inspection.

The substance of the defendant's statement to law enforcement consists of the following: On December 11, 1997 the defendant was interviewed by Detective Bob Murphy. Detective Allen was present during this interview. The defendant provided his [biographical] information and stated that he is originally from Honduras. He had been in the United States for three years and has a green card through I.N.S. He is a senior at Lee High School and speaks English well. He lives with his mother, Belinda Davila, and his brother, Edwin Bustillo, who is seventeen, at 6117 Backlick Road. He has a sister, Damaris Bonilla, who is in her twenties, and lives in an apartment somewhere on Cumberland Avenue. He stated that he cannot remember his sister's address or phone number. He drives a 1986 Pontiac Sunbird 2-door, gray and black in color. He left his car parked near Lee High School. His sister drives a red Honda Civic.

He was read his Miranda rights. He stated he understood his rights and read them back out loud in English. He signed the rights form and said he would speak to them about the case. He was told he had been positively identified by witnesses at the scene. He said he was not there and knows nothing about the case. He said he was home when it happened. He said he does not know the victim James Merry and that he was not at Popeye's restaurant last night. He said the day before he was in detention from 2:20 p.m. to 3:30 p.m. at school for being tardy. He said he left school at 3:30 p.m. in his car and arrived at 3:40 p.m. At

approximately 4:00 p.m. his mother arrived home and they had dinner with his brother. He said at 6:00 p.m. he drove to his sister's apartment on Cumberland Avenue and picked her up and took her to Shopper's Food Warehouse in Franconia somewhere near Springfield Mall or Beulah Street. He said he and his sister grocery shopped and then returned to her apartment at 7:00 p.m. He said he could not recall his sister's address or phone number. He admitted he goes and calls there frequently. He said his sister used his car to go back out to Blockbuster where she rented two movies. He said his sister returned to her apartment at 7:20 p.m. and she and the defendant watched movies. He began to get agitated and irritated at the questions and it was explained they were simply looking for the truth. He could not provide an answer when asked what movie he watched with his sister. He was asked if he was affiliated with a gang and he quickly replied no. He said he has heard of C.S.L. or Commerce Street Locos, but he is not a member. He said he does occasionally hang out with members. He said he was not going to answer any more questions until he could talk with an attorney and the interview was terminated.

At the preliminary hearing Esmirna Christina Hondoy stated after sitting in the back of the courtroom that she didn't think it looked like him.

Johnny Bustamonte told law enforcement that he wasn't there but had heard from unnamed sources that a guy who goes by the name of Sirena had committed the offense. Jose Armando Amaya told law enforcement that he saw the defendant and Sirena at the scene and both had bats. They approached the victim with Sirena behind the defendant. His view was obstructed by a brick pillar and he couldn't tell which one struck the victim. Renyery Alexis Espinoza, Godofredo Jimenez, and Nicolas Parada have also admitted that Sirena was at the scene. Sirena's first name appears to be Julio.

Criminal records of any of the Commonwealth's witnesses involving felony and moral turpitude convictions will be provided when the witness testifies.

Please contact me if you have any questions regarding the above or any other aspect of this case.

Very truly yours,

/s/

Todd F. Sanders

Commonwealth of Virginia

COUNTY OF FAIRFAX

4110 CHAIN BRIDGE ROAD, ROOM 123
FAIRFAX, VIRGINIA 22030-4047

ROBERT F. HORAN, JR.
COMMONWEALTH'S ATTORNEY
RAYMOND F. MORROGH
DEPUTY COMMONWEALTH'S ATTORNEY
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LORI B. DIGIOSIA
IAN M. RODWAY
WILLIAM T. ROOTS, JR.
WILLIAM E. FITZPATRICK
JOHN F. CARROLL
DOUGLAS R. KAY
LAURA F. HERING
ASSISTANTS

March 16, 1998

HAND-DELIVERED

David Bernhard
6105D Arlington Blvd.
Falls Church, Va. 22044

Re: Commonwealth v. Mario Bustillo
Criminal No. 93337

Dear Mr. Bernhard:

Officer Bayliss spoke with some of the witnesses at the scene. His report reflects a description of the assailant as "Mario", w/m, 5' 9", 180 lbs., 17-18 years old, black hair, brown eyes, wavy hair, medium length, wearing a red "nautica sweater", black pants and a black skull cap. The report reflects an aluminum bat was used. Officer Bayliss will be available for trial.

Officer Milam's report reflects a description of the assailant as "Mario", h/m, 18 years old wearing a red shirt and black pants. Officer Milam will be available for trial.

Very truly yours,

/s/
Todd F. Sanders
Assistant Commonwealth's Attorney

tfs

[seal omitted]

CONSULADO DE HONDURAS

1612 K Street, N.W. • Suite 310
Washington, D.C. 20006
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DECLARACION JURADA

Yo, Yolanda Membreño-Castellanos, Primer Secretario Encargada de los Asuntos Consulares de la Embajada de Honduras en Washington, Distrito de Columbia, declaro lo siguiente:

Según consta en los archivos de esta Sección Consular, estas oficinas no fueron informadas por ninguna autoridad del Estado de Virginia ni por cualquier otra persona de la situación en que se encontraba el sr. Bustillo—ciudadano hondureño—antes de terminar su juicio que se llevó a cabo en el mes de marzo de 1998.

En el caso de haber tenido conocimiento—antes de su juicio—de que Mario Bustillo tenía pendiente un juicio por el delito de *Asesinato* en una Corte del Estado de Virginia, el Consulado podría haberle prestado asistencia en su defensa criminal según lo estipulado en la Convención de Viena sobre Relaciones Consulares de 1963.

En el evento de haber sido informada que la teoría de la defensa era que el verdadero culpable era otro joven de nombre "*Julio*" y que ese joven llegó a Tegucigalpa, Honduras el 17 de diciembre de 1997 en el vuelo 769 de Continental Airlines procedente de Houston, Texas, esta Sección Consular pudo haber solicitado a las autoridades pertinentes se investigara con las autoridades de immigración si en tal vuelo viajaba alguna persona bajo ese nombre, su nombre completo y dirección y haber intentado tener un contacto con tal persona para entrevistarlo y determinar una decisión posterior con el fin de asistir de una mejor manera al sr. Bustillo.

[seal omitted]

/s/
Yolanda Membreño-Castellanos
Consul

[notary acknowledgement]

TRANSLATION COVER

Source materials: Statement by from Honduran Consul Yolanda Mem[b]reño-Castellanos, dated March 2, 1998.

Source Language: Spanish

Object Language: English

Translator's Declaration

I, Michael Zogby, hereby certify that I am duly certified by the United States Courts as an interpreter and translator of the Spanish language, and that the attached document is a true and accurate translation of the above-mentioned source materials.

/s/ Michael Zogby — 3/3/99

Michael Zogby — date

Certified Interpreter/Translator

Translator's Note:

Text in Italics has not been translated from the source language. It is rendered as it appears in the original text.

TRANSLATION

[seal]

HONDURAN CONSULATE
1612 K Street N.W. Suite 310
Washington, D.C. 20006
(202) 223-0186 FAX (202) 223-0202

AFFIDAVIT

I, Yolanda Membreño-Castellanos, First Secretary in charge of Consular matters at the Honduran Consulate in Washington, D.C., hereby state the following:

According to this Consulate Section's files, this office was not informed by any authority of the State of Virginia or anyone else of the situation confronted by Mr. Bustillo, a Honduran citizen, before the end of his trial, which took place in March of 1998.

Had we known, before his trial, that Mario Bustillo was facing murder charges in a Virginia state court, the Consulate could have aided him in his criminal defense pursuant to the provisions of the 1963 Vienna Convention on Consular Relations.

Had we been informed that the defense's theory was that the culprit was another young man by the name of "Julio," and that that young man arrived in Tegucigalpa, Honduras, on December 17, 1997, on Continental Airlines' flight 769 from Houston, Texas, this Consular Section could have asked the apropriate authorities to inquire of the immigration authorities whether a person by that name had flown in that flight, that person's full name and address, and could have attempted to contact that person to interview him and afterwards make a decision to render the best possible assistance to Mr. Bustillo.

[seal] /s/
Yolanda Membreño-Castellanos
Consul

[notary acknowledgement]

TRANSLATION COVER

Source materials: Videotape designated "Conversación entre Reniery Alexis Espinoza Maradiaga y Julio César Osorto," which translated means "Conversation between Reniery Alexis Espinoza Maradiaga and Julio César Osorto," and bearing a notarial seal and a signature.

Source Language: Spanish

Object Language: English

Translator's Declaration

I, Raúl F. Ortiz, hereby certify that I am duly certified by the United States Courts as an interpreter and translator of the Spanish language, and that the attached document is a true and accurate translation of the above-mentioned source materials.

/s/ Raúl F. Ortiz — 27 Feb 99

Raúl F. Ortiz — date

Certified Interpreter/Translator

Translator's notes:

1. Text in Italics has not been translated. It is rendered as it appears in the original text.
2. Text enclosed in brackets [] does not appear in the original text. It has been inserted by the translator to enhance comprehension.
3. The left column represents the transcription of the source text. The right column represents the translation into the object language.

4. Footnotes are not part of the source text. They are the translator's comments.

Legend:

[ui]: Unintelligible. In some cases it may only be noise that cannot be distinguished from speech.

[ir]: Interruption in recording

A: Reniery Espinoza

B: Juiio César Osorto

A: ¿Qué chele, vos?

B: Con aquel chele que se metió a pedo por aquellas chavalas.

A: ¿Por la Eva?

B: Ajá.

A: ¿Aquél de allá del gringo, hombre?

B: El pinche gringo, *man*, *that shit*, basura, *man*. Qué clavo ese que me metí, loco. Sabes que el bato se la gana por majes. Es que una vez él me quiso poner en el *High*, me quiso poner también, me quiso poner el dedo. Al Primo le pegó un golpe aquí en la cabeza. Esa vez llegó él con unos batos de la Mara Li, aquella mara de Chirilagua, basura, *man*, y esa vez allí en el Popeye, llegamos nosotros al Popeye y los cabrones empiezan a tirar barrios, y llegamos nosotros locos y entonces nosotros salimos y él también salió y nos estaba

A: What blond guy, man?[1]

B: With that blond guy that got into a fight over those chicks.

A: Over Eva?

B: Uh-huh.

A: You mean that guy with the gringo?

B: That fucking gringo, *man*, *that shit*, damn, *man*. I really did it that time. You know that guy is the biggest idiot. Like, once at the *High* he tried to, he also tried to, he tried to finger me. He hit *Primo*[2] right here on the head. That time he arrived with some homeboys from the Mara[3] Li [gang], that gang from Chirilagua. Damn, *man*, and that time at Popeye's, we got to Popeye's and those bastards started to throw signs, and we homeboys arrived, and then we came out, and he came out too, and he was throwing signs at us.

---

[1] "Blond guy" is translated from the word "chele," which may mean a blond person or simply someone with fair skin and Caucasoid features.

[2] "Primo" means cousin, but it can also be a nickname.

[3] "Mara" means "gang."

tirando barrio.

A: [ui] Yo no, yo voy a ver que ondas aquí.

A: [ui] Not me, I'm going to see what's up.

B: Aquí se puede vivir también.

B: You can get by here.

A: [ui] Yo creo que aquí me voy a quedar trabajando mejor. [ui]

A: [ui] I think I'm going to keep working instead. [ui]

B: Fijate, te voy a decir una cosa. Yo estuve allá cuatro años y no hice nada, y otros majes que se han venido aquí [ui] y he visto a otros majes con pijas de carros y negocios de ellos mismos. Y yo que vine de la U.S.A. palmado, *man*.

B: Look, I'll tell you something. I was there for four years and didn't do a thing, and other guys have come over [ui] and I've seen other guys with fucking cars and their own businesses. And me, having come from the U.S.A. and all, and I'm broke, *man*.

A: Pero es que vos eras pandillero hijo de puta, y sólo te la llevabas jodiendo.

A: But that's because you were a fucking gangsta just messing around.

B: No digas nada que allí andábamos los duques. Andábamos cagando el palo.

B: Hey, man, we both were. We were messing around all over.

A: La cagamos, pero está cabrón.

A: We were messing around, but it's rough.

B: Está cabrón la cosa. Yo para que te voy a decir, yo no ambiciono ir a los Estados Unidos. Vieras cuanto majes ahí que se quieren ir para allá, para allá en los Estado Unidos. Y yo les digo que allá no

B: Sure is rough. I'll tell you, I don't care for going to the United States. You should see how many guys around want to go over there, to the United States there. And I tell them that place is not for

es para cualquiera.

A: Sin paja. ¿Y qué ondas aquí con las viejas? ¿Tienes hijos o qué onda?

B: Tengo dos, *man*. Tengo dos chavas, *man*.

A: [ui] Las otras veces me di cuenta que te habías ido para El Salvador. ¿Qué onda?

B: Sí, anduve allá.

A: ¿Nicaragua?

B: Sí. Es como te digo. [ui] En ese tiempo trabajaba en un camión. Pero al viejo se le fundió el camión. Y sí, yo anduve por todo eso: El Salvador, Nicaragua, Costa Rica, jalando frijol para Honduras.

A: [ui] O sea que te volviste mil usos [ui]

B: ¿Y qué voy a hacer, viejo? Hay que buscar la vida.

A: [ui] Como vos andabas un suéter rojo, puta qué cagada, y andabas un gorro vos. ¿Verdad loco?

B: Es que, puta, loco, fijate que las chavalas, yo sabía que esas chavalas me iban a que-

just anybody.

A: No shit. What about women here? You have children, or what?

B: I have two, *man*. I have two kids, *man*.

A: [ui] I heard some times before you had gone to El Salvador. What was that?

B: Yeah, I was there.

A: Nicaragua?

B: It's like I say. [ui] At that time I was working with a truck. But old man blew the engine on the truck. Yeah, I drove around all over there: El Salvador, Nicaragua, Costa Rica, hauling beans to Honduras.

A: [ui] So you did everything [ui]

B: What do you want, man? You gotta make a living.

A: [ui] Like, you were wearing a red sweater, fuck, what shit, and you were wearing a cap. Right, homeboy?

B: It's just that, fuck, homes,[1] see, the chicks, I knew those chicks were going to burn me,

[1] "Homes" is used as variation of "homeboy."

mar, hom. Yo por eso no me dejaba ver de esas putas, *man*. *Shit*, dije yo, me voy para Honduras, dije yo.

man. That's why I wouldn't let those bitches see me, *man*. *Shit*, I said, I'm going to Honduras, I said.

A: Pero esas estaban adentro, [ui] la Valeria y la Claudia.

A: But they were inside, [ui] Valeria and Claudia.

B: Sí, esas parece estaban adentro. Es que el hijo de puta salió él solo.

B: Yea, seems like they were inside. It's just that the son of a bitch came out alone.

A: A fumar un cigarro.

A: To smoke a cigarette.

B: A fumar un cigarro y a tirar barrio. Mala onda, viejo. Y allí en la zona de nosotros. A tirar barrio el hijo de puta.

B: To smoke a cigarette and throw signs. Bad news, man. And there, in our hood. Throwing signs that son of a bitch.

A: O sea que lo hallaste con el cigarro en la boca.

A: So you found him with the cigarette in his mouth.

B: Se lo metí ese cigarro de un solo bombazo. Que se lo tragara, loco. ¡Cómo sonó ese bombazo!

B: I shoved it down with one whack. So he would swallow it, homes. Man, that was loud!

A: Pero ¿vos pensaste, o no le hacías el chilazo?

A: But did you think, or you didn't think the blow...

B: No, yo, yo...

B: No, I, I...

A: Voz lo querías calentar, pero se te pasó la mano.

A: You wanted to [b]eat him up, but you overdid it.

B: Se me pasó la mano. Es que calentó el maje.

B: I overdid it. It's just that that fool made me mad.

[ir]

[ir]

B: Esas muchachas estaban adentro.

B: Those girls were inside.

A: Verdad que estaban adentro.

B: Ellas estaban adentro. Él salió afuera, no más él solo [ui].

A: Y vos, ¿para dónde agarraste cuando le diste el vergazo?

B: ¿Ja?

A: ¿Vos para dónde agarraste?

B: ¡Já! ¿Y me iba a quedar allí, pues? Me fui por el lado del *Giant* . . .

A: El *Giant*.

B: . . . al lado del *Giant* por *McDonald's*. . .

A: Sí.

B: . . . por donde están los *CD's*.

A: Sí.

B: Pues yo miré cuando llegó la jura. Pero, ¿cómo me iba a quedar allí yo? ¿Acaso que soy maje? Tras que llegué a la esquina donde venden los *CD's*, tras que llegué a la esquina. . .

A: Por allí por los teléfonos estaba yo.

B: . . .me contuve y me fui

A: That's right, they were inside.

B: They were inside. He came out, just by himself [ui].

A: And where did you go after you smacked him?

B: Huh?

A: Where did you go?

B: Ha! You think I was going to stay there? I went over towards the *Giant*, . . .

A: The *Giant*.

B: . . . next to the *Giant* by McDonald's, . . .

A: Yeah.

B: . . . over where the *CD's* are.

A: Yeah.

B: See, I saw when the cops arrived. So how could I stay there? You think I'm stupid? After I got to the corner where they sell the *CD's*, after I got to the corner. . .

A: I was around there by the phones.

B: . . .I got a hold of myself

despacito. Los policías andaban así. Esa vez estuvo calentito allí. No ves que medio mundo andaba corriendo, uno por allá, otro por acá.

and started off slowly. The police were all over. It was hot that time. Everybody and his brother was running, one over here, another over there.

A: Pero ¿vos no pensaste que te lo habías echado, o sentiste que le diste duro?

A: But did you think you had thrashed him, or did you feel like you had hit him hard?

B: Mira, *man*. Yo cuando le pegué ese animalazo, no, yo, yo le escuché como un cajón que le sonó a ese hijo de puta. Pero no sé, como se lo llevaron al hospital, ¿me entiendes?, y yo me vine también...

B: Look, *man*. When I smashed him with that blow... I... man, I heard that son of a bitch sound like a big box. But I don't know, since they took him to the hospital, you know?, and I left, too...

A: Y el bate, ¿qué le hiciste?

A: What about the bat? What did you do with it?

B: ¿Ja?

B: Huh?

A: ¿Te lo llevaste con vos? ¿Dónde está el bate?

A: Did you take it with you? Where's the bat?

B: Lo boté allá por la escuela.

B: I threw it away over by the school.

A: ¿Sí?

A: Yeah?

B: Aquella escuela que está allá atrás donde está el campo donde íbamos a jugar pelota. [ui] Allá lo tiré a la quebrada.

B: That school back over there by that field where we used to go play ball. [ui] I threw it the hell away.[5]

A: Sí.

A: Yeah.

---

[5] This phrase can also mean "I threw it over into the ravine," or "I threw it over into the mountain stream."

B: Es que yo me fui a meter un rato allí, porque yo miraba muchos policías en la calle. Tuve miedo, pues. Y me estuve un buen rato allí. Me compré un seis de cerveza allí en el *CVS*.

B: You see, I went over there to stay for a while because I saw a lot of cops on the street. You know—I was afraid. So I stayed a good while there. I bought myself a six-pack of beer at *CVS*.

A: Y te fuiste a la pija.

A: And you got the hell out of there.

B: Y me fui a metérmelas allá.

B: And I went over there to drink them.

[ir]

[ir]

A: Que Mario era, loco. Lo confundieron con vos, loco, diciendo que andaba de sombrero, con el gorro, y vos andabas de gorro y de suéter.

A: That it was Mario, homes. They confused him with you, homes, saying he was wearing a hat, with the cap, and you were wearing a hat and a sweater.

B: Suéter rojo andaba yo, y un gorro negro.

B: I was wearing a red sweater and a black cap.

A: ¿Verdad? Vos te quitaste el gorro allí, ¿no?

A: Yeah, right? You took off the cap there, right?

B: Sí, hombre.

B: Yeah, man.

A: Tal vez te reconocieron.

A: Maybe they recognized you.

B: No, pues es que yo me lo quité cuando iba por la esquina.

B: No, because I took it off as I was rounding the corner.

A: ¿Sí?

A: Yeah?

B: Sí.

B: Yeah.

A: ¿Es que vos saliste corriendo [ui] para la

A: So you took off running [ui]

esquina?

B: Todo el mundo salió corriendo. ¿Cómo me iba a quedar yo allí?

A: ¿Y Jesse te siguió, vos?

B: ¿Ja?

A: ¿Te siguió Jesse?

B: Sí.

A: ¿Más o menos cuánto?

B: Mira, no me siguió mucho, *man*. Me siguió poco. Sólo me quedó viendo.

A: Ese puto tuvo la culpa de todo. Vos ya sabías, ¿verdad? Si a vos te quiso poner en el *High*.

B: Sí.

A: [ui] y al el Primo.

B: Sí.

A: Sí.

B: No hay nada.

[ir]

B: Pero mira ahora yo ya no me pongo más esas mierdas. Vos también así me dijiste.

A: Andas pegado.

B: Cuando me vine sí me los ponía. Andaba con los pantalones. Como un mes anduve así. Pero cien por ciento vi

towards the corner?

B: Everybody took off running. You think I was going to stick around?

A: And Jesse followed you?

B: Huh?

A: Jesse followed you?

B: Yeah.

A: About how far?

B: Well, he didn't follow me far, *man*. Just a little. He just kept looking at me.

A: It was all that bastard's fault. You knew that already, right? He wanted to finger you at the *High*.

B: Yeah.

A: [ui] and Primo.

B: Yeah.

A: Yeah.

B: It's empty.

[ir]

B: But look, I don't wear that shit any more. You told me that, too.

A: You wear tight stuff.

B: When I had just come I would wear them. I'd wear the pants. I went around like that for about a month. But I

que no me convenía [ui] y los vendí. Los fui vendiendo casi todos. Sólo uno tengo allí, que de vez en cuando me lo pongo en mis loqueras. Y es que me animo que como que estoy allá y me los pongo.

just saw it wasn't a good idea [ui] and I sold them. I sold them all off. I just have one left. I put it on every now and then when I get crazy. I just get a feeling I'm back over there and I put them on.

A: Aquí te matan si andas así.

A: They'll kill you here if you dress like that.

B: Me los pongo y me pongo los *Timberlands*, y me voy, como quien dice, estoy en la U.S.A. aquí. Ando ilusionado sólo, pues.

B: I put those on and I put on the *Timberlands*, and I take off, just like being in the U.S.A. here. Just day-dreaming, you know.

A: Aquí la policía te mata si andas así.

A: The police here will kill you if you go around like that.

B: ¿No miras que hasta los aritos también me quité, viejo?

B: Man, don't you see I even took off the earrings?

A: Puta, igual que a mí. Tres andaba, y no ando nada.

A: Fuck, just like me. I used to wear three, now I don't wear any.

B: A veces me animo a ponerme uno, [ui] ¿pero para qué, loco? Pero no. ¿Para qué, eh? La gente me dice que parezco culero.

B: Sometimes I get the urge and put one on, [ui] but what's the use, homes? No, man. What for, eh? People tell me I look like a fag.

A: Ja, ja. No le paran bolas las viejas a uno. Julio, Sirena, puto [ui]

A: Ha, ha. The girls won't pay attention. Julio, Sirena, bastard [ui]

B: ¡Esos batos como me pusieron!

B: Those homeboys really did it to me.

A: Como si venías de Alaska,

A: As if you were coming

¿verdad, Sirena?

B: Sí, venía del mar, viejo.

A: Venías del mar, chavalo. Da miedo. En camiseta caminabas vos.

B: En shorts y camisetas. ¿No te acordabas? [ui] Y [ui] ¿Y el chavo aquel del Máxima aquel? Se lo comieron, ¿verdad?

A: Ya lo vendió el padrastro.

B: ¿No tiene más [ui]

A: El Célica blanco.

B: [ui]

A: Sí.

B: No vuelve a comprar otro carro.

A: Ese hijo de puta es la pija.

B: No trabaja, ¿verdad loco? Lo mantienen las mujeres así.

A: Lo mantienen las mujeres y los suegros.

B: Oh, el viejo no lo quiere, ¿verdad? Esa gente la cagan, loco. ¿Qué más quieren?

A: Sí, hombre. Estudiaba. ¿Qué más quería?

from Alaska, right Sirena?

B: Yeah, I was coming from the sea, man.

A: You were coming from the sea, dude. Scary. You went around with a tank top.

B: Shorts and tank top. Remember? [ui] And [ui] What about that dude with the Maxima? Gone, right?

A: His stepfather sold it.

B: He doesn't have any more?

A: The white Celica.

B: [ui]

A: Yeah.

B: He won't buy another car.

A: That son of a bitch is big shit.

B: He doesn't work, right? Women support him.

A: Women and in-laws support him.

B: Oh, the old man doesn't like him, right? Those people are shit, homes. What do they want?

A: Yeah, man. He was going to school. What else did he want?

B: Yo salí así, sólo con el pantalón y una camisa, y otro pantalón y otra camisa. Así venía yo con dos mudadas no más y un maletín chiquito.

B: I came out like this, with just pants and a shirt, and another set of pants and a shirt. That's how I came, with just two changes of clothes and a little bag.

A: Así me dijo Janet. Con una mochila y una gorrita.

A: That's what Janet told me. With a backpack and a cap.

B: Sí, una gorrita Polo doblada así para atrás. Así venía yo. Así es la chapa. Eso es todo, una gorrita y un pantalón negro.

B: Yeah, a Polo cap turned back like this. That's how I came. That's the style. That's it, a cap and black pants.

A: Le trajiste la ropa a Cruz y a la Brosa. Así es el cuento allá.

A: You brought Cruz and la Brosa's clothes. That's what they say over there.

B: [ui] Una camisa fue y así habla tanta mierda. ¿No ves que él me robó una Polo a mí? Me la sacaron del maletín.

B: [ui] just a shirt and they're saying all that shit. You know he stole a Polo one from me? They took it out of the bag.

A: Sí.

A: Yeah.

B: Ese hijo de puta de la Brosa, mejor lo hubiera matado aquel día yo. A [ui] a ese hijo de puta allá en la galera. Allí me hubiera gustado trabarlo de vuelta para que no sea tan mierda.

B: That son of a bitch la Brosa, I should have killed him that day. [ui] that son of a bitch over there at the galley.[6] I would have liked to get him there again so he wouldn't be such a big shit.

A: ¿Te acordás en la Ruta Uno, aquella vez que te dieron verga en la cara?

A: Remember on Route One, that time when they whacked you in the face?

---

[6] Galley can also be translated slaughterhouse.

B: Sí, ¿y no me dejó botado él, pues?

B: Yeah, and he just left me there, didn't he?

A: Y yo te levanté a vos.

A: And I picked you up.

B: Vos me le levantaste.

B: You picked me up.

A: Sí. ¿Y no te tenían con la pata en el pescuezo, y yo te levanté?

A: Yeah. They had you with one foot on your neck, didn't they? And I picked you up.

B: Ja.

B: Ha.

A: ¿Y no vivíamos en el mismo apartamento, loco? ¿Cómo que no?

A: And we lived in the same apartment, didn't we, homeboy? Right, man.

B: Yo ni cuenta me di. Fijate viejo, yo amanecí en la casa. Yo amanecí a [ui], pero no sé cómo amanecí.

B: I wasn't even aware of it. Look, man, I just woke up at home. I woke up [ui], but I don't even know how I made it.

A: Bien matado a pija.

A: You were totally thrashed.

B: Sí, 'ta bueno. Los Liros locos fueron esos, ¿verdad?

B: Yeah, man. It was those Liros homeboys, wasn't it?

A: ¡Los Liros putos!

A: Those fucking Liros!

B: ¡Los Liros putos fueron!

B: It was those fucking Liros!

A: Así es la vida del pandillero, bato.

A: That's the life of a gangsta, homes.

B: Así es, loco.

B: That's how it is, homes.

A: Hoy estás vivo, mañana podés estar muerto.

A: Alive today, tomorrow could be dead.

B: La Primera fue la que deshizo los Pershing y [ui] allí, ¿verdad?	B: It was First [Street][7] that wiped out Pershing and [ui] there, right?
A: La Primera loco, esos hijos de puta fueron.	A: First [Street], homes, those son of a bitches.
B: Deshicieron a los Pershing.	B: They wiped out Pershing.
A: La Primera y los Tigres fueron los que pijearon al hermano de Sergio.	A: First [Street] and the Tigers were the ones that kicked Sergio's brother's ass.
B: Los dos para él solo.	B: The two of them against him alone.
A: Lo hicieron pija, loco.	A: They kicked his ass, homes.
B: Y siempre bajan las jebas de allá. Tenías una jeba vos en la Ruta Uno, ¿verdad?	B: And those chicks still come down. You had a girl on Route One, right?
A: Sí, Ana.	A: Yeah, Ana.
B: ¿Cuál?	B: Who?
A: Ana la patas pandas. No sé cómo se llamaba. [ui] Jessica, loco.	A: Ana the bow-legged one. I don't know her name. [ui] Jessica, homes.
B: [ui]	B: [ui]
A: [ui] Oh, te vi en una foto. ¿Te acordás que una vez salimos de caballeros?	A: [ui] Oh, I saw you in a photograph. Remember we got all dressed up[8] once?
B: Sí.	B: Yeah.

[7] "La Primera" means "the First." Translator assumes by the context that it refers to First Street.

[8] "All dressed up," literally "came out as gentlemen," may also mean came out as ushers in a wedding.

A: ¿Saliste vos de caballero?

B: Sí, en el vergueo con el gordo allá.

A: Oh, sí. Saliste cuando le dieron pija a aquellos.

B: Ya.

A: Salimos de caballeros de corbatín y todo el pedo.

B: Tipo magnate.

A: Yo andaba bien a pija, y vos andabas medio tomado ¿verdad?

B: Yo andaba tomado. Yo antes de irme para allá, yo me metí dos puros. [ui] Cuando yo andaba allá andaba un poco noqueado, pero yo sabía lo que andaba haciendo. Y es que yo llegué con el Sergio allí. Y es que como yo no tenía cachos, ¿verdad? Zapatillas, ¿verdad?

A: Oh, sí, a Payless Shoes se fueron.

B: Venite, me dice Sergio, vamos para allá. Sólo vamos al mandado. Sólo llévate la caja, y le quitamos los sellos, [ui] y ya salimos. Sólo me fui a cambiar a la casa que ni me bañé. Con eso te cuento todo. Y me cambio, loco, y le digo a

A: You got all dressed up?

B: Yeah, during that fat guy's fight guy.

A: Oh, yeah. You came out that time when they kicked those guy's asses.

B: Yeah.

A: We got all dressed up with bow tie and all that shit.

B: Like big shots.

A: I was really smashed, and you were kind-of drunk, too.

B: I was drunk. I had two smokes before going over there. [ui] When I was there I was a little high, but I knew what I was doing. And, like, I went over there to Sergio's. And, like, since I had no shoes, you know? Sneakers, right?

A: Oh, yeah, you went to Payless Shoes.

B: So Sergio says to me, come on, let's go over there, to do some shopping. Just bring the box and we'll take off the tags, [ui] and we went out. I just went home to change my shirt and didn't even take a bath. You can

Sergio: echémonos un puro antes que salgamos para allá. Vámonos, pues, me dijo. Dos nos echamos en vez de uno. Y luego nos fuimos para allá, loco. Y me salió uno que andaba de caballero, que era de la Li También.

imagine. So I changed and said to Sergio, let's have a smoke before we go over there. All right, he said. We had two instead of one. And then we went over there, homes. And a guy who was all dressed up[9] came out, also from the Li.

A: Oh, ya sé, uno que parecía que era el dueño, ese culero.

A: Oh, I know, one that looked like the owner, that fag.

B: Y me dice: ¿Qué onda, Sirena? ¿Qué pedo?, le digo yo. Echémonos un loco, me dijo. Echémonoslo, pues, le dije. De modo que me crucé como tres, y como tres cervezas allí. Ya cuando ya entramos p'adentro yo ando un poco noqueado, pero yo sabía lo que andaba haciendo yo.

B: And he says to me, what's up Sirena? What shit?, I said. Let's do a crazy one, he said. Let's do it, I told him. So I had about three, about three beers there. So when we went in I was a bit juiced, but I knew what I was doing.

A: Pero cambiando de plática, cuando le pusiste al gringo, cuando le diste el vergazo al gringo en la cabeza, ¿andabas moteado, o qué ondas? ¿Andabas medio quemado?

A: But, changing the subject, when you gave it to the gringo, when you gave the gringo that whack on the head, were you on pot or what? Were you half stoned?

B: Sí. Andaba un poco tapirulo, viejo.

B: Yeah, I was kind of high, man.

A: Bueno, más o menos,

A: Well, did you more or less

[9] See footnote 8.

¿sabías lo que andabas haciendo?

know what you were doing?

B: Sí, ¿y yo no estaba allá metido a donde Perico, pues?

B: Yeah. Wasn't I over there at Perico's?

A: Oh, allá estabas con el Perico.

A: Oh, you were over at Perico's.

B: Sí, estaba donde el Perico cuando ustedes llegaron allí, viejo, a traernos para que fuéramos a tirar el rol por allá. Y todo fue que llegáramos allí a ese *fucking* Popeye, y nos bajamos allí viejo.

B: Yeah, I was over at Perico's when you guys got there, man, to pick us up to go throw the roll over there. And then we just arrived at that *fucking* Popeye and got out, man.

A: Y comenzamos. . . [ui]

A: And we started. . . [ui]

[end of tape]

TRANSLATION COVER

Source materials: Videotape designated "Conversación entre Reniery Alexis Espinoza Maradiaga y Julio César Osorto #2," which translated means "Conversation between Reniery Alexis Espinoza Maradiaga and Julio César Osorto #2," and bearing a notarial seal and a signature.

Source Language: Spanish

Object Language: English

Translator's Declaration

I, Raúl F. Ortiz, hereby certify that I am duly certified by the United States Courts as an interpreter and translator of the Spanish language, and that the attached document is a true and accurate translation of the above-mentioned source materials.

/s/ Raúl F. Ortiz — 27 Feb 99

Raúl F. Ortiz — date

Certified Interpreter/Translator

Translator's notes:

1. Text in italics has not been translated. It is rendered as it appears in the original text.
2. Text enclosed in brackets [] does not appear in the original text. It has been inserted by the translator to enhance comprehension.
3. The left column represents the transcription of the source text. The right column represents the translation into the object language.

4. Footnotes are not part of the source text. They are the translator's comments.

Legend:

[ui]: Unintelligible. In some cases it may only be noise that cannot be distinguished from speech.

A: Reniery Espinoza

B: Julio César Osorto

C: Person not seen in video

A: Uno, dos, trés, probando. Yo soy Reniery Espinoza, y voy a tratar de grabar a Julio César Osorto, más conocido como Sirena.

C: Reniery, Reniery, ahí viene Sirena.

A: Cerremos la puerta para tratar de colocar esta onda. [pause] ¿Qué onda?

B: Tranquilo.

A: ¿Qué te habías hecho, *man*? Puta qué bien que te encontré, *man*, hace un més que te ando buscando, *man*.

B: Por ahí he estado, *man*.

A: ¿Y solo andas, o andas con más? ¿Quiénes son esos majes?

B: Mis primos son.

A: Yo creí que ibas a venir solo, *man*. Como dijiste que nos íbamos a echar las frías, ¿qué u?

B: No, *man*, ando un poco apurado. Sólo quiero hacerte unas preguntas. Yo tengo unos parientes ahí en Virginia, *man*, que me dijeron que tenga cuidado con vos

A: One, two, three, testing. This is Reniery Espinoza, and I am going to try to record Julio César Osorto, better known as Sirena.

C: Reniery, Reniery, here comes Sirena.

A: Let's close the door to try to set up this stuff. [pause] What's up?

B: Easy.

A: Where've you been, *man*? Fuck, I'm glad I found you, *man*, I've been looking for you for a month, *man*.

B: I've been around, man.

A: And you're alone or with others? Who are those guys?

B: They're my cousins.

A: I thought you were going to come by yourself, *man*. Since you said we were going to have some beers, what's up?

B: No, *man*, I'm kind of in a hurry. I just want to ask you some questions. I have these relatives in Virginia, *man*, that told me to be careful with you because you testified in

porque vos atestiguaste en favor de aquel maje hijo de puta.

A: Ah. No fui yo, *man*. Pero no pasó nada. ¿Cómo te voy a quemar a vos yo? ¡Puta!

B: Pero vos conoces la familia de ése, *man*. Y ojalá no andes de bocón vos, hijo de puta.

A: No, *man*, sólo los conozco, y vos sos mi amigo. Mario era sólo un conocido, *man*.

B: Pero es vale verga, *man*. Algo debe estar pagando ese chavo que hizo antes.

A: No, pero yo siempre me siento mal. Vos sabés bien que él no lo hizo. Por eso yo me siento mal, loco.

B: Yo no sé. Yo creo que aquellos majes no me quemaron a mí. Porque si me hubieran quemado ya hubieran dejado libre a ese chavalo.

A: A saber, puta, qué pasa, loco. Sin paja, Mario allá está en el bote. Pero no te preocupes, *man*, Mario ya se la comió.

B: Eh, más vale que estés

favor of that fool son of a bitch.

A: Ah. It wasn't me, *man*. But nothing happened. How could I burn you? Fuck!

B: But you know that guy's family, *man*. And I hope you're not snitching, son of a bitch.

A: No, *man*, I just know them, but you're my friend. Mario was just an acquaintance, *man*.

B: But I don't fucking care, *man*. That guy must be paying for something he did before.

A: No, but I still feel bad about it. You know well that he didn't do it. That's why I feel bad, homes.

B: I don't know. I don't think those guys burned me. Because, if they had burned me they would have let that guy go.

A: Who knows, fuck, what's up, homes. No shit, Mario is in the can. But don't worry, *man*, Mario's gone.

B: Eh, you'd better go

bien, porque ya me conoces. Cualquier onda ya sabes qué pedo. Yo por eso traje a mis primos, *man*. Para que conozcan dónde vives y toda la cosa. Cualquier onda que me pase a mí ya sabes. Mejor me voy, *man*.

A: No, no te vayas.

B: Me estoy enojando, *man*. Y cuando me enojo es peligroso. Mejor me voy. Tal vez nos vemos otro día.

A: [pause] Ojalá que hayamos grabado a ese maje, porque no creo que vuelva a hablar con nosotros.

[end of tape]

straight, because you know what I'm like. Any shit and you know what's going to go down. That's why I brought my cousins, *man*. So they would see where you live and all that. Anything happens to me and you know. I'd better go, *man*.

A: No, don't go.

B: I'm getting mad, *man*. And when I get made it gets dangerous. I'd better go. Maybe we'll see each other some other time.

A: [pause] I hope we recorded that guy, because I don't think he'll talk to us again.

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto" and "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto #2", respectively.

In both videotapes, I recognized the individual facing the camera as "Sirena," the young man whom I witnessed committing the December 10, 1997 assault on another young man in Springfield, VA.

/s/ Jose Maldonado
Jose Maldonado
7116 Kerr Dr.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto" and "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto #2", respectively.

In both videotapes, I recognized the individual facing the camera as "Sirena," the young man whom I witnessed committing the December 10, 1997 assault on another young man in Springfield, VA.

/s/ Geovani Hernandez
Geovani Hernandez
6113 Amherst Ave.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto" and "Conversacion entre Reniery Alexis Espinoza Maradiaga y Julio Cesar Osorto #2", respectively.

In both videotapes, I recognized the individual facing the camera as "Sirena," the young man whom I witnessed committing the December 10, 1997 assault on another young man in Springfield, VA.

/s/ Marvin Escobar
Marvin Escobar
6124 Cumberland Ave.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath as follows:

I viewed, without sound, two videotapes marked "Videotape No. 1" and "Videotape No. 2", respectively, and each bearing the name of Jose Maldonado and a signature.

In both videotapes, I recognized the individual facing the camera as the young man whom I witnessed committing the December 10, 1997 assault on James Merry in Springfield, VA.

/s/ Yahayra Queirolo
Yahayra Onaney Queirolo
6529 Wren Dr.
Springfield, VA 22150

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath:

Had I been advised prior to my trial of my right to confer with the Consulate of Honduras, I would have done so without delay.

/s/ Mario A. Bustillo
Mario A. Bustillo

[notary acknowledgement]

AFFIDAVIT

I hereby state under oath:

I was present at the Popeye's Restaurant in S[p]ringfield, VA on the evening of Dec. 10, 1997 when an American young man was struck in the head.

I was leaving the restaurant when the young man, who was standing three to five meters from me, was hit in the head and fell to the ground bleeding. I could see the assailant as he struck the blow and recognized him as a young man named Julio that everyone called "Sirena." I knew Mario Bustillo at the time, but did not see him in the area that evening.

The attached photocopy of a photograph is of the assailant, Sirena.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

Several weeks after the assault, I was interviewed at the Fairfax Jail by a Fairfax detective named Perez with another detective, an older American with gray hair.

Perez spoke to me in Spanish and translated for the other man. Perez told me that he already knew who had committed the crime, Mario Bustillo, and that he did not need me to confirm that for him. I told Perez that I had not seen Mario that evening. Perez asked me to describe the whereabouts that evening of several other individuals who were on the scene. I told Perez that "Chema," "El Brujo," "Marvin el Chele," "La Vaca" and others were on the scene.

As to Mario, however, I continued to maintain I had not seen him. Perez became irate, insisting that Mario had been there. I insisted that Mario had not. Perez told me that he knew the streets and that I could not lie to him. I still would not agree that Mario had been there.

Perez told me that he knew I was illegal and that he would have me and my entire family deported. I told him to go ahead.

If Perez had not threatened to deport my family, I would have told him that Sirena had done it. As it was, I was afraid to.

I never spoke to Mario's attorney, David Bernhard, about this case. Had he asked me, I would have told him that I saw Sirena commit the crime. Had I been asked to testify at trial, I would have identified the assailant as Sirena and confirmed that the attached photocopy of a photograph was of him.

/s/ Godofredo Jimenez
Godofredo Jimenez

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

During the first hearing in late December 1997, Michele Gutierrez, Jesse Konstanty, Michele's boyfriend, Tony and I were all waiting in the area with sofas outside the courtrooms. Det. Perez was coming in and out. Tony came out of court to say that Jesse had changed his story on the stand. I got angry and got up and left before hearing how Jesse had changed his story, but Det. Perez was seated on the same couch with us and heard what Tony said.

Jesse was not in a position to see the attacker as he was facing away from James. Plus there was a large poster in the window between James and the table where Jesse, Michele and Valeria were seated. I don't think any of them could have seen who hit James. I was able to see since I was mopping the floor closer to James and at a different angle to James. Once we heard James getting hit, I screamed and Jesse got up and ran out into the parking lot and came back a couple of minutes later with his shirt in his hand and only his tank top on.

During the trial, Jesse, Michele, Valeria, Nicolas Parada and I were all kept in the same witness room. Nicolas was only there one day. The rest of us were there for the whole trial. Jesse, Michele and Valeria told the rest of us what they had testified to as soon as they came back in from court and they were talking throughout to each other and to me about their testimony. Det. Perez was coming in and out and he overheard us discussing the testimony at least four or five times. He never told Jesse, Michele or Valeria not to discuss their testimony.

Several days of the trial Det. Perez took us to lunch in the cafeteria in the courthouse or another one nearby (he accompanied us, we paid for ourselves). At lunch, we continued to discuss testimony unless someone could overhear us. The only time we refrained from discussing testimony

was when we were outside the courtroom and somebody from Mario's side would walk by.

I never testified at the trial, but I had my doubts about Mario's guilt at that point and I told Valeria so while Det. Perez was seated with us at the same table. Det. Perez told us that Nicolas was being brought from school to testify against Mario. I told Valeria that "Frijolito" (Nicolas) had told my friend Clara Castro that Mario hadn't done it and that he (Nicolas) knew that for sure. I also told Valeria that Clara had seen Mario at school the day after the attack and that he bore no signs of being punched in the face as Jesse claimed. Det. Perez pretended to look at his papers and said nothing.

About an hour and a half later, I asked Det. Perez directly why Nicolas was testifying against Mario when he'd told my friend that he knew for certain that Mario had not done it. Det. Perez just said that Mario's "own homeboys" had said he'd done it.

From the begin[n]ing, Valeria did not want to testify. After Jesse had testified, I asked Det. Perez if Valeria had to testify and [he] told Valeria in front of me that she did or she would go to jail—just say that Mario had done it. Valeria had told me earlier that she was afraid to be arrested because she had no papers to be in this country.

As I stated earlier, I was able to see the profile and clothes of the person who hit James. The attached photocopy of a photograph is of the assailant. I identified the assailant as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga. Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual. I know him as Sirena.

I know Julio a.k.a. "Sirena" because I dated him when I was younger. He used to tell me he was the leader of the Commerce Street Locos and that he would kill for Commerce. I never took him seriously because the Commerce Street Locos never did anything bad. We used to call them "Mara Pampers" (the "Pampers Gang" in English).

I initially told police that I thought Mario had done it because I had just watched Jesse and Michele telling the police that it was Mario. Also, I had only seen Mario and Nicolas wearing red that day, but Nicolas had a white swatch on his pullover. Also, Cristina had been outside with James and said it was Mario. I did tell the police that the assailant had shoulder length hair. Mario had too when I last saw him up close several weeks earlier. Clara went to school with Mario and told me, however, that his hair was short by the time of the crime. I'd seen Mario at Popeye's earlier that evening, between 4:30 and 5:30, but only from a distance and in the dark. He was in the area of the parking lot at that point as were a number of other boys. Everyone left after I swore at one of them and told him to take his friends and leave. When they came back one to two hours later, I did not notice that Mario and a couple of others were with them. Mario, in fact, may have been just coming or going when I saw him. When I spoke to the police, I assumed that he had returned even though I had not seen him, because Jesse and Michele said it was him and so had Cristina.

/s/ Claudia Tafur
Claudia Tafur

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I testified truthfully at the trial of Mario Bustillo when I stated that I had observed the attack on James on Dec. 10, 1997 at the Popeye's in Springfield, VA and that Mario Bustillo was not the assailant.

I had told Det. Cline in court at the Preliminary Hearing that Mario Bustillo did not look like the person I saw commit the assault.

I said this to Det. Cline because it was the truth. I had never met Mario Bustillo's father at that point and did not meet him until several days later on New Year's.

Mr. Bustillo never suggested to me that I should testify to any particular fact and I never understood him to want me to testify other than truthfully. I repaid his loan of $150 shortly after Mario Bustillo's trial and I never felt myself bound by virtue of the loan or of the $20 gift for food for my little girl to tell other than the truth.

After I told Det. Cline that Mario Bustillo did not look like the assailant, Det. Perez called my house more times than I can remember and left me notes. I took one of his telephone calls and told him I had told Det. Cline the truth. He told me to stop lying and that he was going to have me imprisoned and deported if I kept lying when I went to court.

He repeated this threat twice in person when he put me in his car against my stated will, once alone and once with Det. Cline.

The subject of the attached photocopy of a photograph resembles the person who struck James. James' attacker had longer hair. I identified him as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Esmirna Cristina Hondoy
Esmirna Cristina Hondoy

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

The attached photocopy of a photograph is of the young man named Julio whom I observed on the evening of December 10, 1997 outside the Popeye's Restaurant in Springfield, VA with a bat in his hand.

I identified Julio as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

Following my sworn declaration in August 1998, I found Officer Gelabert in the satellite police station that he frequented. He indicated that he had been required to attend a court hearing because of my statement and that I should not involve myself in a case that is already closed. He stated that otherwise, I could create serious problems for myself and could end up in jail.

On other occasions Officer Gelabert has told me that he regrets that he was not in charge of the investigation, because he knew that Julio "La Sirena" had committed the crime. Officer Gelabert also told me he tried to apprehend Julio several days after the crime, but that Julio had escaped.

/s/ Amilcar Lagos
Amilcar Lagos

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
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FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

[seal omitted]

EMBAJADA DE HONDURAS
SECCION CONSULAR

1528 K Street, N.W. • 2nd Floor
Washington, D.C. 20005
(202) 737-2972 / 78 • FAX (202) 737-2907
e-mail: consul.hondurasdcusa@verizon.net

AFFIDAVIT

I hereby declare under oath:

I am the person in charge of the Honduran Consular Section of the Embassy of Honduras in Washington, D.C.

The records of the Office of the Population and Migration Policy of the Republic of Honduras reflect that a young man named "Julio" arrived in Tegucigalpa, Honduras on Continental Flight 769 on December 17, 1997 and that he is a Honduran citizen and his full name is JULIO CESAR OSORTO HERRERA. Attached, a copy of the pertinent portion of the aforementioned records, certified as correct by the custodian of said records whose certification is certified by the person to whom said custodian reports.

The records of the National Registry of Persons of the Republic of Honduras reflect that Mr. Osorto Herrera's National Identity number is 0801-1976-05566 and include, along with other biographical data, his fingerprint and photography submitted to the Registry by Mr. Osorto Herrera on January 13, 1998. Attached, a copy of the pertinent portion of these Records certified as correct by the custodian of said records whose certification is certified by the person to whom said custodian reports.

As previously stated by my predecessor, Yolanda Membreño Castellanos, this Consulate had no knowledge, prior to his trial, of the murder charge against Honduran Citizen Mario A. Bustillo that led to his trial in the Fairfax County (Virginia) Circuit Court in March, 1998. Had this Consulate

been so informed prior to the trial, it would have endeavoured to help Mr. Bustillo in his defense. This help would, at the very least, have included providing him the attached records as Certified.

[seal omitted] /s/ David Alfonso Hernández Caballero
Mr. David Alfonso Hernández Caballero
Nov. 28, 2001

[notary aeknowledgement]

DIVISION DE SISTEMAS DE INFORMACIÓN
MOVIMIENTO MIGRATORIO ANORMAL
97

Nombre de Viajero:	OSORTO HERRERA, JULIO CESAR
Nacionalidad:	HONDURAS
Pals de Procedencia:	ESTADOS UNIDOS
Tipo de viajero:	NACIONAL
Sexo:	MASCULINO
Edad:	21 Años
Direccion:	
COL. LAS	AYESTAS COMAYAGUELA
Empresa que Viaia:	CONTINENTAL
Salida ó Entrada:	ENTRADA
Fecha de cierre:	17 DIC. 97
Inspector Atendio:	OLGA MARINA ARITA VILLEDA
Clave:	AU
Numero de Boleta:	17533523
Documento de viaje:	686485
Delegacion:	TONCONTIN
Observaciones:	ANORMAL
Transcriptora:	MM

El Suscrito Jefe de La División de Sistemas de Información de La Dirección General de Población y Política Migratoria, Certifica como correcta la Impresión de MOVIMIENTO MIGRATORIO del Señor **JULIO CESAR OSORTO HERRERA**, SELLO Y FIRMA JOSE ALEJO CHANG, JEFE DE LA DIVISION DE SISTEMAS DE INFORMACION." Tegucigalpa., M.D.C., 08 de marzo del año 2001.

[seal] [signature] [seal] [sigature]

Ex. 26a

[seal omitted]

MINISTERIO DE GOBERNACION Y JUSTICIA

DIRECCION GENERAL DE POBLACION

APARTADO POSTAL 494 — TEGUCIGALPA, M. D. C.

C E R T I F I C A C I O N

El Infrascrito, Secretario general de la Dirección General de Población y Política Migratoria, CERTIFICA lo siguiente: El Suscrito Jefe de La; División de Sistemas de Información de la Dirección General de Población y Política Migratoria, CERTIFICA como correcta la Impresión de MOVIMIENTO MIGRATORIO del señor **JULIO CESAR OSORTO HERRERA**, SELLO Y FIRMA JOSE - ALEJO CHANG, JEFE DE LA DIVISION DE SISTEMAS DE INFORMACIÓN." Tegucigalpa M.D.C., 08 de marzo del año 2001.

Extendida en la Ciudad de Tegucigalpa, Municipio del Distrito Central, a los ocho días del mes de marzo del año dos mil uno.

[signature] [seal]

LIC. RAMON ROSA SANCHEZ, DORMES
SECRETARIO GENERAL.

AUTENTICA.

N° 2662-2001

El Infrascrito Secretaría General de la Secretaría de Gobernación y Justicia. debidamente autorizado CERTIFICA: que es auténtica la firma que antecede y dice:

RAMON ROSA SANCHEZ DORMES

puesta en su carácter de SECRETARIO GENERAL DE LA DIRECCION GENERAL DE POBLACION.

Tegucigalpa, M.D.C. 12 de MARZO de ANO 2001

[seal]

[seal] [signature]

RICARDO LARA WATSON
SECRETARIO GENERAL

[seal] [seal]

mjm.

V.B. [signature] [seal]
SECCION DE AUTENTICAS

[seal] [rubber stamp]

SECRETARIA DE RELACIONES EXTERIORES

No. 6756

El infrascrito, Secretario General de la Secretaría de Estado en el Despacho de Relaciones Exteriores Debidamente Autorizado.

CERTIFICA: que es auténtica la firma que antecede y dice:
RICARDO LARA WATSON

Puesta en su carácter de: SECRETARIO GENERAL DE LA SECRETARIA DE GOBERNACIÓN Y JUSTICIA.

Tegucigalpa, M.D.C., 14 de MARZO de 2001.

[signature] [seal]

ARMANDO ROMERO CLAUDINO
ASISTENTE DE LA SECRETARIA GENERAL
ADSCRITO A LA OFICINA DE AUTENTICAS

SPECIFIC AUTHENTICATION CERTIFICATE

REPUBLIC OF HONDURAS	)	
CENTRAL DISTRICT	)	
CITY OF TEGUCIGALPA	)	SS.
EMBASSY OF THE UNITED	)	
STATES OF AMERICA	)	

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of the country of venue to execute that document.

ARMANDO ROMERO CLAUDINO

(SEAL)

/s/ John M. Jones
JOHN M. JONES
Consul General of the
United States of America
March 20, 2001

Statement of Translator

Source Document: Five (5) pages of official documents from various government agencies in Honduras, concerning certain travel transactions of Julio Cesar Osor{t}o Herrera

Object Document: Five (5) page translation of the source document

I, Raúl F. Ortiz, hereby certify that I am certified as an Interpreter/Translator of the Spanish language by the Courts of the United States, and that the following document is a true and accurate translation from Spanish into English of the above-listed source document.

/s/ Raúl F. Ortiz — 4 January 2002
Raúl F. Ortiz — date
Certified Interpreter/Translator
for the United States Courts

Translator notes:

1. Text in italics appears in English in the source document. It has not been translated.
2. Text in brackets does not appear in the source document. It has been added to enhance comprehension.

GENERAL BUREAU OF POPULATION AND TRAVEL
INFORMATION SYSTEMS DIVISION
NON-STANDARD TRAVEL TRANSACTION

Name of Traveler:	OSORTO HERRERA, JULIO CESAR
Nationality:	HONDURAS
Country of Origin:	UNITED STATES
Type of Traveler:	NATIONAL
Sex:	MALE
Age:	21 years
Address:	
COL. LAS	AYESTAS COMAYAGUELA
Travel Carrier:	CONTINENTAL
Exit or Entry:	ENTRY
Closing date:	17 Dec. 97
Attending Inspector:	OLGA MARINA ARITA VILLEDA
Key:	AU
Ticket Number:	17533523
Travel Document:	686485
Delegation:	TONCONTIN
Observations:	NON-STANDARD
Transcriber:	MM

The undersigned Chief of the Information Systems Division of the General Bureau of Population and Travel, hereby Certifies as true the record of TRAVEL TRANSACTION of Mr. JULIO CESAR OSORTO HERRERA, STAMPED AND SIGNED BY JOSE ALEJO CHANG, CHIEF OF THE INFORMATION SYSTEMS DIVISION." Tegucigalpa, M.D.C., March 8, 2001.

[rubber stamp] [signature] [rubber stamp] [signature]

DEPARTMENT OF JUSTICE
GENERAL BUREAU OF POPULATION
POST OFFICE BOX 949 – TEGUCIGALPA, M.D.C.

[round seal]

GENERAL BUREAU OF POPULATION
AND TRAVEL, HONDURAS

CERTIFICATION

The undersigned Secretary General of the General Bureau of Population and Travel, hereby CERTIFIES the following: The undersigned chief of the Information Systems Division of the General Bureau of Population and Travel, hereby CERTIFIES as true the record of TRAVEL by Mr. JULIO CESAR OSORTO HERRERA, sealed and signed by JOSE ALEJO CHANG, CHIEF OF THE INFORMATION SYSTEMS DIVISION." Tegucigalpa, M.D.C., March 8, 2001.

Issued at the City of Tegucigalpa, Municipality of the Central District, on this eighth day of the month of March of the year two thousand and one.

[rubber stamp] [rubber stamp] [signature]

RAMON ROSA SANCHEZ DORMES
SECRETARY GENERAL

AUTHENTICATION

No. 2662-2001

The undersigned duly authorized Secretary General of the Department of Justice hereby CERTIFIES: that the foregoing signature is authentic and reads as follows:

RAMON ROSA SANCHEZ DORMES

Subscribed in his capacity as SECRETARY GENERAL OF THE GENERAL BUREAU OF POPULATION

Tegucigalpa, M.D.C. March 12, 2001

THIS OFFICE DOES NOT TAKE RESPONSIBILITY FOR THE CONTENTS OF THIS DOCUMENT

[round rubber stamp] [signature]

RICARDO LARA WATSON
SECRETARY GENERAL

[rubber stamp:] AUTHENTICATION
#6756
SECRETARY OF FOREIGN RELATIONS

Cert. [signature]
AUTHENTICATION
SECTION

[Inside a triple-bordered box:]
THIS OFFICE DOES NOT TAKE
RESPONSIBILITY FOR
THE CONTENTS OF THIS
DOCUMENT

[glue-on stamp] [rubber stamp over glue-on]

SECRETARY OF FOREIGN RELATIONS

No. 6756

The undersigned Secretary General of the Department of State at the Duly Authorized Office of Foreign Relations.

CERTIFIES: that the foregoing signature is genuine and reads as follows: RICARDO LARA WATSON

Subscribed in his capacity as: SECRETARY GENERAL OF THE JUSTICE DEPARTMENT.

Tegucigalpa , M.D.C., March 14, 2001.

[signature]

[rubber stamp]

ARMANDO ROMERO CLAUDINO
ASSISTANT SECRETARY GENERAL
ATTACHED TO THE OFFICE OF
AUTHENTICATIONS

SPECIFIC AUTHENTICATION CERTIFICATE

REPUBLIC OF HONDURAS	)	
CENTRAL DISTRICT	)	
CITY OF TEGUCIGALPA	)	*SS.*
EMBASSY OF THE UNITED	)	
STATES OF AMERICA	)	

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of the country of venue to execute that document.

ARMANDO ROMERO CLAUDINO

(SEAL)

[signature]
JOHN M. JONES
Consul General of the
United States of America
March 20, 2001

Statement of Translator

Source Document: Five (5) pages of official documents from various government agencies in Honduras, confirming the identity of Julio Cesar Osor[t]o Herrera

Object Document: Five (5) page translation of the source document

I, Raúl F. Ortiz, hereby certify that I am certified as an Interpreter/Translator of the Spanish language by the Courts of the United States, and that the following document is a true and accurate translation from Spanish into English of the above-listed source document.

/s/ Raúl F. Ortiz — 4 January 2002

Raúl F. Ortiz — date
Certified Interpreter/Translator
for the United States Courts

Translator notes:

1. Text in italics appears in English in the source document. It has not been translated.
2. Text in brackets does not appear in the source document. It has been added to enhance comprehension.

[photograph]

NAME	JULIO CESAR OSORTO HERRERA
IDENTITY	0801-1976-05566
PLACE AND DATE OF BIRTH	08 01 NOVEMBER 25, 1976
MARITAL STATUS	SINGLE
OCCUPATION	STUDENT
FATHER	VICENTE OSORTO
MOTHER	MARIA IGNACIA HERRERA
ADDRESS	F.M., D.C., BO. LOS PROFESORES
PHOTOGRAPH AND PRINT	JANUARY 13, 1998

[finger print] [finger print] [signature]

RIGHT INDEX LEFT INDEX

NOTE: THE PHOTOGRAPH AND PRINT ARE STORED AT THE A.F.I.S. SYSTEM

CERTIFICATION

The undersigned Director of the National Identification Program (NIP), Walter Castellanos, Esq., hereby **CERTIFIES** that the photograph, prints and demographic information printed in the attached signed and stamped sheet are copies of the original kept in the files of the AFIS computer system concerning Mr. **JULIO CESAR OSORTO HERRERA**.

Issued in the City of Tegucigalpa, Municipality of the Central District, on the sixth day of the month of March of the year two thousand and one.

[rubber stamp]

[signature]

Walter Castellanos, Esq.
Executive Director

Cert. [signature]

DAGOBERTO CASTELLANOS LANZA
DIRECTOR, N.R.P.
NATIONAL REGISTRY OF PERSONS

AUTHENTICATION

No. 22834-2001

The undersigned Senior Officer of the National Court of Elections, hereby CERTIFIES: That the foregoing signature executed by: Dagoberto Castellanos General Director of the National Registry of Persons is genuine, who in turn authenticates the signature of: _____ Civil Registrar of the municipality of: C. D. Department: Fco. Morazán, subscribing the Certification of: prints photograph of Julio Cesar Osorto Herrera.

TEGUCIGALPA, M.D.C. March 8, 2001

[rubber stamp] [signature]

JOSE RUBEHÍN HERNÁNDEZ VEGA
SENIOR OFFICER OF THE N.C.E.

AUTHENTICATION [partial rubber stamp]

2663-2001

The undersigned Secretary General of the Department of Justice [Spanish: Secretaría de Gobernación y Justicia], being duly authorized, hereby CERTIFIES: that the foregoing signature is genuine and reads as follows: JOSE RUBEIIIN HERNANDEZ VEGA subscribed in his capacity as SENIOR OFFICER OF THE NATIONAL COURT OF ELECTIONS IN AUTHENTICATION No. 22834-2001

Tegucigalpa, M.D.C. March 12, 2001

THIS OFFICE DOES NOT TAKE RESPONSIBILITY FOR THE CONTENTS OF THIS DOCUMENT

[stamp] [signature]

RICARDO LARA WATSON
SECRETARY GENERAL

[rubber stamp:] AUTHENTICATION
#6755
SECRETARY OF FOREIGN RELATIONS

Cert. [signature]

[Inside a triple-bordered box:]

AUTHENTICATION SECTION

THIS OFFICE DOES NOT TAKE RESPONSIBILITY FOR THE CONTENTS OF THIS DOCUMENT

[glue-on stamp] [rubber stamp over glue-on]

SECRETARY OF FOREIGN RELATIONS

No. 6755

The undersigned Secretary General of the Department of State at the Duly Authorized Office of Foreign Relations.

CERTIFIES: that the foregoing signature is genuine and reads as follows: RICARDO LARA WATSON

Subscribed in his capacity as: SECRETARY GENERAL OF THE JUSTICE DEPARTMENT.

Tegucigalpa, M.D.C., March 14, 2001.

[signature]

[rubber stamp]

ARMANDO ROMERO CLAUDINO
ASSISTANT SECRETARY GENERAL
ATTACHED TO THE OFFICE OF
AUTHENTICATIONS

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted] [fingerprint omitted]

DERECHA INDICE IZQUIERDA INDICE

[seal omitted] [signature omitted]

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

CERTIFICACION

El infrascrito Gerente del Programa de Identificación Nacional (PIN) Lic. Walter Castellanos, **CERTIFICA**, que la foto, huellas y datos demográficos impresos en hoja adjunta, sellada y firmada son copia del original que se encuentra en el archivo del sistema de computo AFIS del Ciudadano **JULIO CESAR OSORTO HERRERA.**

Dado en la ciudad de Tegucigalpa, Municipio del Distrito Central, a los seis días del mes de Marzo del dos mil uno.

[seal omitted] [signature omitted]

Lic. WALTER CASTELLANOS

Gerente Ejecutivo

[seal omitted]

Vto. Bno. /s/ Castellanos

LIC. DAGOBERTO CASTELLANOS LANZA
DIRECTOR, R.N.P.
REGISTRO NACIONAL DE LAS PERSONAS

AUTENTICA

N° 22834-2001

El Infrascrito OFICIAL MAYOR del Tribunal Nacional de Elecciones, CERTIFICA: Que la firma que antecede puesta por: Dagoberto Castellanos Director General del Registro Nacional de las Personas es auténtica, quien a su vez autentica la firma de: _____ Registrador Civil del Municipio de: D. C. Departamento: Fco. Marzán puesta en la Certificación de: foto de huellas de, Julio Cesar Osorto Herrera.

TEGUCIGALPA, M.D.C. 8 de Marzo de 2001

[stamp omitted] [signature omitted]

JOSE RUBEHÍN HERNÁNDEZ VEGA
OFICIAL MAYOR DEL T.N.E.

AUTENTICA.

N° 2663-2001

El Infrascrito Secretaría General de la Secretaría de Gobernación y Justicia. debidamente autorizado CERTIFICA: que es auténtica la firma que antecede y dice:

JOSE RUBEHIN HERNANDEZ VEGA

puesta en su carácter de OFICIAL MAYOR

DEL TRIBUNAL NACIONAL DE ELECCIONES

EN LA AUTENTICA No. 22834-2001

Tegucigalpa, M.D.C. 12 de MARZO de ANO 2001

[seal omitted]

[seal omitted] [signature omitted]

RICARDO LARA WATSON
SECRETARIO GENERAL

[seal omitted]

mjm.

V.B. [signature omitted] [seal omitted]
SECCION DE AUTENTICAS

[seal omitted] [stamp omitted]

SECRETARIA DE RELACIONES EXTERIORES

No.6755

El infrascrito, Secretario General de la Secretaría de Estado en el Despacho de Relaciones Exteriores Debidamente Autorizado.

CERTIFICA: que es auténtica la firma que antecede y dice:
RICARDO LARA WATSON

Puesta en su carácter de: SECRETARIO GENERAL DE LA SECRETARIA DE GOBERNACIÓN Y JUSTICIA.

Tegucigalpa, M.D.C., 14 de MARZO de 2001.

[signature omitted] [seal omitted]

ARMANDO ROMERO CLAUDINO
ASISTENTE DE LA SECRETARIA GENERAL
ADSCRITO A LA OFICINA DE AUTENTICAS

SPECIFIC AUTHENTICATION CERTIFICATE

REPUBLIC OF HONDURAS)
CENTRAL DISTRICT)
CITY OF TEGUCIGALPA) SS.
EMBASSY OF THE UNITED)
STATES OF AMERICA)

I certify that the annexed document is executed by the genuine signature and seal of the following named official who, in an official capacity, is empowered by the laws of the country of venue to execute that document.

ARMANDO ROMERO CLAUDINO

(SEAL OMITTED)

/s/ John M. Jones
JOHN M. JONES
Consul General of the
United States of America
March 20, 2001

AFFIDAVIT

Further to my affidavit of May 21, 1998, I hereby state under oath:

The attached photocopy of a photograph is of Sirena.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

Sirena was wearing a red garment on his upper body when he committed the attack. He may also have been wearing a black cap without a bill or visor and a jacket, but the red garment or pullover was what I noticed as he committed the attack.

I was available to be interviewed prior to the trial. Had Mario Bustillo's attorney or the police asked me before the trial, I would have stated that I saw Sirena commit the crime.

Had I been asked to testify at trial, I would have identified the assailant as Sirena and confirmed that the attached photocopy of a photograph was of him.

This affidavit is also further to my two affidavits of January 27, 1999.

/s/ Jose Maldonado
Jose Maldonado

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I hereby state under oath:

I am known by the nickname "Brujo."

I was present at the Popeye's Restaurant in S[p]ringfield, VA on the evening of Dec. 10, 1997 when an American young man was struck in the head.

I was roughly 2 meters from the young man as he was hit in the head and fell to the ground. The assailant wore a red sweater or similar garment. I could see the assailant as he struck the blow and recognized him as a young man named Julio that everyone called "Sirena." I knew Mario Bustillo at the time, but did not see him in the area that evening.

The attached photocopy of a photograph is of the assailant, Sirena.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

I was questioned by Det. Perez and a colleague later that evening. Det. Perez insisted Mario was the culprit. I admitted being on the scene, but said I had not seen Mario. I did not tell them that I had seen the attack or that Sirena had committed it.

I was also interviewed by Mario's attorney prior to the trial. As with the police, I said only that I had been there and had not seen Mario.

/s/ Jorge Maldonado
Jorge Maldonado

[notary acknowledgement]

[PHOTOGRAPH OMITTED]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

The attached photocopy of a photograph is of "Sirena."

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Marvin Escobar
Marvin Escobar
7216 Commerce St., Apt. 101
Springfield, VA 22150

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I hereby state under oath:

The attached photocopy of a photograph is of Sirena, the person who grabbed a bat from me in the Popeye's parking lot in Springfield, VA on the evening of December 10, 1997.

I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga. Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

On the evening of Dec. 10, 1997, Jesse and a friend were inside the Popeyes. Prior to that evening, Jesse had made a habit of seeking out with his Mara Li friends those that lived around Commerce Street and belonged to the Commerce Street Locos. Upon finding one alone, Jesse and his friends would beat him with bats. Prior to that evening, Amilcar ("Perico") and Alex Rios were beaten by Jesse and his friends in this fashion.

On the evening of Dec. 10, 1997, I and the other Commerce Street Locos were seeking to have Jesse come outside and fight one of us—[one] on one. Jesse was not used to those odds and refused to come outside, but someone, probably Valeria, came outside and said she was calling other members of Mara Li. The bat was produced and handled by us in order to protect ourselves from the Mara Li. To my knowledge, nobody planned to use the bat on Jesse or his friend. What we wanted was to see Jesse get his face beaten in by fists in a fair fight.

/s/ Lisandro Parada
Lisandro Parada

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

Further to my earlier affidavits and testimony on this matter, I hereby state under oath:

I stand by my earlier affidavits.

When I was cross examined by the prosecutor on June 17, 1998, I answered "Yes" when he asked me if I had identified Mario as the attacker to the police the night of the offense. I did not understand the question. I was never interviewed the night of the offense and when I finally was interviewed by Det. Cline at my house, I said that I thought it was a guy named "Mario" and that my reason for so thinking was because Valeria had told me so. I had never seen a picture of Mario Bustillo at that point and did not realize until going to court before New Year's 1998 that the accused was someone I knew as "Masiso."

The attached photocopy of a photograph is of the young man whom I observed on the evening of December 10, 1997 outside the Popeye's Restaurant in Springfield, VA strike James Merry in the head with a bat. I have no question, but that he is the one who did it.

I identified him as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

I also know who he is. He used to be called "Sirena," but the night of the attack I only knew he looked familiar without remembering specifically why. When I saw him in the group photograph that Mr. Kiyonaga showed me when I made my first affidavit and when I saw him in the videotape that Mr. Kiyonaga later showed me, I realized he looked familiar because he had gone out with one of my girlfriends.

I thought I recalled his nickname as "Sirena," but wasn't sure because it means mermaid. I thought that maybe I was mistaken and he was actually called "Sereno," which means serene, or "Zorino," which means fox, so I did not let on. I had already seen one person wrongly convicted of the crime. I did not want to say a name that was close, but not correct, and get a second person in trouble by mistake. Now, almost everyone who talks about the crime says "Sirena" did it and I realize that I correctly remembered the name he went by.

When I was at court before New Year's 1998 and told Det. Cline that Jesse Konstanty was lying when he said he chased James' attacker, I was referring to the fact that Jesse came out of the restaurant and made a purely token effort to run after the people that were fleeing. He didn't go more than 10 feet. Jesse was a friend of mine and I knew him to be brave only when he had several friends with him and he was picking on one guy. Running alone after one guy, much less a number of guys, was not his style.

Jesse was also lying when he testified that he hit the attacker and I told Det. Cline this. Jesse never caught up with anyone and did not appear to want to.

Jesse was also lying when he testified at the same hearing that he wasn't in a gang. I knew he belonged to Mara Li and told Det. Cline so.

/s/ Yahayra Queirolo
Yahayra Queirolo

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

As I testified at Mario Bustillo's trial, I was present at the Popeye's Restaurant in S[p]ringfield, VA on the evening of Dec. 10, 1997 when an American young man was struck in the head.

I was roughly 3 or 4 meters from the young man as he was hit in the head and fell to the ground. The assailant wore a red sweater or similar garment and a black cap without a visor. I could see the assailant as he struck the blow and recognized him as a young man named Julio that everyone called "Sirena." The victim had come out and lit a cigarette in front of a big sign in the window and appeared to be laughing at us[.] The blow happened very fast and surprised me. We had humiliated the victim and Jesse in front of the girls they were with inside the restaurant and I thought we were just leaving.

The victim's friend, Jesse, came out of the restaurant and went to the victim and then ran yelling very briefly in the direction of the people fleeing the scene, but did not appear to be chasing anyone in particular. Jesse then returned to the victim.

I knew Mario Bustillo at the time, but did not see him at any time that evening. Mario's hair at the time was shorter than Sirena's.

The attached photocopy of a photograph is of the assailant, Sirena. I identified Sirena as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga. Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Amilcar Amaya
Amilcar Amaya

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
DOMICILIO	F.M., D.C., BO. LOS PROFESORES
FOTO Y HUELLA	13 DE ENERO DE 1998

[fingerprint omitted]
DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

AFFIDAVIT

I hereby state under oath:

The attached photocopy of a photograph is of the young man whom I knew as "Sirena" and whom I observed on my flight to Honduras on Dec. 17, 1997 as I testified at the trial of Mario Bustillo.

I identified him as the subject of the photograph without seeing the biographical information which appears under it as the information had been covered when I was shown the photocopy of the photograph by Attorney John Kiyonaga.

Attorney Kiyonaga did not suggest to me who the photocopy of the photograph portrays, but simply asked if I recognized the individual.

/s/ Ulma Martinez
Ulma Martinez

[notary acknowledgement]

[photograph omitted]

NOMBRE	**JULIO CESAR OSORTO HERRERA**
IDENTIDAD	0801-1976-05566
LUGAR Y FECHA NACIMIENTO	08 01 25 DE NOVIEMBRE DE 1976
ESTADO CIVIL	SOLTERO
OCUPACION	ESTUDIANTE
PADRE	VICENTE OSORTO
MADRE	MARIA IGNACIA HERRERA
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FOTO Y HUELLA	13 DE ENERO DE 1998

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DERECHA INDICE

[fingerprint omitted]
IZQUIERDA INDICE

NOTA: LA FOTO Y HUELLA SE ENCUENTRAN ALMACENADAS EN EL SISTEMA A.F.I.S.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

AFFIDAVIT

THE AFFIANT, RICHARD PEREZ, FIRST BEING DULY SWORN, STATES AS FOLLOWS:

1. I have been a Detective with the Fairfax County Police since 1997. I was assigned, along with Detective Richard Cline, to investigate the assault of James Merry. I base this affidavit on my recollection and a review of investigative notes.

2. Mario Bustillo alleges that I threatened various witnesses with jail or deportation if they did not identify Mario Bustillo as the person who attacked James Merry. He also alleges that I harassed certain witnesses. I never made any such threats, nor did I harass or pressure anyone. It has never been my practice to intimidate witnesses or to threaten deportation. In a criminal investigation, it is important to gain the trust of the witnesses. That sense of trust would never be gained by making threats or by trying to intimidate witnesses. I do not have any involvement with deportation matters. Finally, I do not and did not try to discourage anyone from talking to defense attorneys.

3. I did not make any threats to Valeria Landaeta or tell her to "just say that Mario did it." She was a reluctant witness who would have preferred not to be involved. My notes also reflect that within minutes of the incident she, along with Claudia Tafur, identified Mario Bustillo as the suspect and both of them took detective Michele Dubois to show her where Mario lived.

4. I never threatened Lisandro or Nicolas Parada with jail if Lisandro refused to say that Mario took the bat from him. Lisandro never told me that Mario never took the bat from him. My notes show that Lisandro was interviewed at the Bryant school on January 6, 1998. His statements were vague and his memory selective. He tried to distance himself from the event and said he never saw the actual assault.

5. With regard to Godofredo Jimenez, I made no threats to him. We interviewed him on January 7, 1998, at the adult detention center. My notes reflect that he named those who were present at the scene of the assault. He never said that Mario was not there. To the contrary, he told us Mario was there. He said that he saw people running, but did not see the actual assault.

6. Claudia Tafur never told me that Nicolas Parada had informed her that he knew for certain that Mario had not done it. Nor did she ever tell me that Clara Castro had seen Mario after the attack and he showed no sign of having been struck.

7. I never made any threats of jail or deportation to Yahayra Quierolo. I deny ever harassing Esmirna Hondoy.

8. I do not recall whether I was in the same room as Jesse Konstanty, Michele Gutierrez and Valeria Landaeta during Mario's trial. Witnesses are usually out in the hallway rather than in a separate room. I do not recall observing any conversation between these witnesses. If I had, I certainly would have stifled their conversation immediately, and brought it to the attention of the Commonwealth's Attorney to remedy the issue.

Respectfully submitted,

/s/ Richard Perez

Richard Perez

[notary acknowledgement]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA, COUNTY OF FAIRFAX, TO-WIT:

THE AFFIANT, RICHARD J. CLINE, FIRST BEING DULY SWORN, STATES AS FOLLOWS:

1. I have worked for the Fairfax County Policy since 1980. I have been a detective since 1983. On December 10, 1997, I was a criminal investigator in the Homicide Branch of the Fairfax County Policy. I investigated, with Detective Richard Perez, the murder of James Merry. I have reviewed my investigative notes in preparing to respond to the allegations made by Mr. Bustillo.

2. Concerning Valeria Landaeta, I never told her that she had to say the same thing (implicating Mario Bustillo) at trial. I told her to tell the truth and to say what she saw. I never made any threats to her or to anyone else. Landaeta was afraid of the gang members. She was placed under police protection because she had been threatened and intimidated by the Commerce Street Locos.

3. After the attack occurred, my notes reflect that I arrived at the scene around 11:30 p.m. There were many potential witnesses at the Franconia Station. It is quite probable that we interviewed Jesse Konstanty and Michelle Gutierrez together initially. Our first task that night was to form a quick synopsis of the basic facts: who the witnesses were and what they knew. Once they gave us that information, we took their names and some other information and contacted them later on an individual basis. The substation at Franconia is small. It would not be feasible to separate all the witnesses into different rooms. I categorically deny any allegation that I coached witnesses.

4. At the preliminary hearing, Yahayra Queirolo told me that she was not sure that Mario was the same guy who attacked James Merry. Her statement was definitely equivocal. I immediately brought her statement to the attention of Mr. Sanders. I never threatened her with prison and never called her mother. Nor did I try to discourage her from speaking with defense counsel.

5. We spoke with Jose Amaya Canas on January 7, 1998. According to my notes, he named individuals who were there when the attack took place. He said that Sirena and Mario had baseball bats. He described Mario's and Sirena's clothing. He heard Mario say something to the effect of "let's hit him." We took him back to the crime scene and he showed us where he was st[illegible]ng when the assault occurred. His view was obstructed by a brick pillar. He said that Sirena was behind Mario and he could not see who actually hit the victim.

6. Michele Gutierrez' boyfriend never told me at the preliminary hearing that Jesse Konstanty's testimony contradicted his original version of the events.

7. I never received any photograph of Sirena. Before trial, we were not even sure if Sirena was a real person. To

the best of my knowledge we have no identifiers on Sirena and I am still unsure as to his true identity.

8. I had no involvement with any deportation procedures. Nor did I threaten anyone with deportation. The facsimile cover sheet shows that another division of the Fairfax County Policy Department, the gang unit, sent that fax to the Immigration and Naturalization Service. I would not have wanted Canas deported because his statement was favorable to the Commonwealth. He actually placed Bustillo at the scene—which contradicted Bustillo's affidavit. He did not make any statements that exculpated Mario Bustillo.

Respectfully submitted,

/s/ Richard J. Cline

Richard J Cline

[notary acknowledgement]

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

MEMORANDUM OPINION

This case is before the Court on Petitioner's Application for a Writ of Habeas Corpus pursuant to § 8.01-654 *et seq.* of the Code of Virginia.

On January 20, 1998, a Fairfax County grand jury indicted Mario Bustillo (hereinafter Petitioner) for first degree murder. On March 20, 1998, a jury found Petitioner guilty of first degree murder and sentenced him to thirty (30) years in the penitentiary. On June 12, 1998, Petitioner made a motion to set aside the verdict. After an evidentiary hearing, Judge Gerald Bruce Lee denied Petitioner's Motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied on April 11, 2000. Petitioner then appealed the case to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court denied Petitioner's writ of certiorari on June 4, 2001. This Petition follows.

Petitioner claims that the Commonwealth engaged in several acts of prosecutorial misconduct. Petitioner also contends that his trial counsel was so ineffective as to amount to a violation of the protections afforded to him by the United States Constitution.

I. FACTS OF THE UNDERLYING CONVICTION AND APPEAL

The evidence in the underlying criminal action revealed that on or about the night of December 10, 1997, James Merry was struck in the head by another young man with a baseball bat in the parking lot of a Popeye's Restaurant in Springfield, Virginia. Merry died several days later. The Petitioner was later arrested and charged with murder based on the statements of several individuals who witnessed the incident.

At trial, each witness identified Petitioner as the assailant based on their past knowledge of him from the local high school and their recollection of the assailant's clothes that night—a red sweater or jacket. Additionally, the Commonwealth produced witnesses linking Petitioner to a group of Hispanic men who allegedly belonged to a gang called the "Commerce Street Locos."

Petitioner's evidence consisted of six witnesses, including a female who was standing next to the decedent when he was struck. She testified that Petitioner was not the assailant. Additional defense witnesses corroborated her testimony and further indicated that another individual named "Sirena" was responsible for the assault.

II. PROSECUTORIAL MISCONDUCT

Petitioner's first claim is prosecutorial misconduct. He specifically alleges the following:

(1) The Commonwealth failed to disclose exculpatory evidence;

(2) The Commonwealth engaged in improper and suggestive witness coaching;

(3) The Commonwealth threatened and intimidated witnesses in exchange for incriminating testimony;

(4) The Commonwealth failed to inform Petitioner of his Vienna Convention rights;

(5) The Fairfax County Police had improper contact with a member of the jury; and

(6) The Commonwealth prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

III. LEGAL ANALYSIS

Petitioner alleges in essence that the Commonwealth engaged in a course of prosecutorial misconduct consciously calculated to convict the wrong defendant. However, many of Petitioner's prosecutorial misconduct claims are procedurally barred. The seminal case establishing the standard of review in a habeas corpus proceeding states that a habeas petition is not an appellate substitute. *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975). When claims are available or are adjudicated at trial or on appeal, a Petitioner may not raise the issues again in a habeas corpus petition. *Id.* at 29-30.

Specifically, Petitioner contends that the Commonwealth, including the Fairfax County Police Department, wrongly suppressed exculpatory evidence and engaged in unlawful and prejudicial conduct. However, Virginia law precludes Petitioner from litigating or relitigating claims that could have been raised and argued at trial or during the appellate process. *See Slayton*, 215 Va. at 29-30. In addition, "absent a change of circumstances, previous determination of the issues by . . . state . . . courts will be conclusive" in a habeas review. *Hawks v. Cox*, 211 Va. 91, 95 (1970). Moreover, prisoners are denied further relief if they state no new claims or try to reengage allegations that were resolved against them in the appellate process. *Id.*

Petitioner also urges that numerous witness recantations, evidence of alleged perjured testimony, and recently altered witness recollections be admitted to prove his innocence. However, the existence of newly discovered evidence arguably relevant to guilt is not a ground for habeas relief, and may not be considered by the Court. *See Fitzgerald v. Bass*, 6 Va. App. 38, 46 (1988) (witness recantations not a basis for relief).

A. Exculpatory Evidence Claim

The standard of review applicable to allegations of wrongful suppression of exculpatory evidence is rooted in the case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). If evidence favorable to a defendant is material to the defendant's guilt, regardless of the prosecution's good or bad faith intention, withholding of that evidence potentially violates due process. *Id.* at 87. The Supreme Court further crafted a "materiality standard" for courts to apply in analyzing claims of allegedly withheld exculpatory evidence. *See United States v. Bagley*, 473 U.S. 667 (1985). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. To determine the amount of potential prejudice that the withheld evidence caused during trial, courts in Virginia assess the reasonable probability of a different trial result, taking into account the difficulties of trying to envision how the defense would have proceeded at trial had the evidence been disclosed. *See Robinson v. Commonwealth*, 231 Va. 142, 152 (1986).

Petitioner claims that the exculpatory evidence the Commonwealth allegedly withheld at trial and during discovery would have created reasonable doubt with respect to the identity of the assailant. Petitioner's burden is to

demonstrate that, in light of the entire record, the omitted evidence would have provided the jury with a basis for reasonable doubt as to his guilt. *See Soering v. Deeds*, 255 Va. 457, 464 (1998). "Evidence proffered by an accused that merely suggests a third party *may* have committed the crime charged is inadmissible; only when proffered evidence tends *clearly* to point to some other person as the guilty party will such proof be admitted." *Id.* (citing *Karnes v. Commonwealth*, 125 Va. 758, 766 (1919) (emphasis included).

The record reveals that defense counsel targeted another man named "Sirena," whose real name is Julio Cesar Osorto, as the true assailant, but failed to produce any probative evidence of this man's existence. Petitioner asserts that the Commonwealth possessed a photograph and videotape of Osorto. The videotape allegedly shows Orsorto confessing to the crime following his flight to Honduras, thus linking him, at least, to the scene of the crime. The record is unclear as to if and when the Commonwealth possessed the alleged photograph and videotape.

Petitioner's claim that the Commonwealth withheld the photo and videotape may have merit if the Commonwealth had the items in its possession and failed to disclose the evidence before or during trial. Respondent's assertion that the *Brady* standard does not apply if the evidence in dispute was available to defendant from other sources fails in this instance if Petitioner lacked knowledge of its existence at the time of trial. *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852 (1986)). In that case, Petitioner would not have had such a claim available during trial or his series of appeals that followed.

The record appears to support Petitioner's claim that he had no knowledge of the pictures or videotape at trial, thus making them unavailable through any means other than

disclosure by the Commonwealth. Assuming, *arguendo*, that the Commonwealth did have such evidence at the time of trial, a colorable argument exists that both the *Brady* and *Bagley* standards may be satisfied and that there is a serious question as to reasonable doubt under *Soering*. Therefore, it is the Court's opinion that an evidentiary hearing is necessary to determine whether the Commonwealth possessed the photo and videotape, and whether such possession was at a time in which disclosure would have been beneficial to Petitioner.

While Petitioner's first claim concerning exculpatory evidence warrants further examination, his remaining claims of prosecutorial misconduct must be dismissed. In his petition, Petitioner makes numerous claims that the Commonwealth improperly coached witnesses; threatened witnesses with deportation and prosecution; tampered with the jury; failed to inform Petitioner of his Vienna Convention rights; and wrongly promoted the unsubstantiated claim that Petitioner was a "gang" member in order to inflame the jury. Despite the breadth and details of these claims, they are all procedurally barred by the *Slayton* and *Hawks* holdings. Because these claims were available to Petitioner during trial and through the appellate process, the Court does not reach the merits of those claims in the instant proceeding.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next challenges the effectiveness of the assistance of his trial counsel. His allegations consist of the following:

(1) His attorney failed to produce exculpatory witnesses;

(2) His attorney failed to timely object to certain testimony offered by the Commonwealth;

(3) His attorney failed to object to the Commonwealth's continued references to Petitioner's gang affiliation;

(4) His attorney failed to inform him of his Vienna Convention rights to meet with the Honduran Consulate; and

(5) His attorney's relationship with a police officer assigned to the case presented a conflict of interest.

V. LEGAL ANALYSIS

The standard two-prong analysis for analyzing inadequate assistance of counsel claims in habeas corpus petitions was set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a Petitioner must show that trial counsel made errors so egregious as to implicate Petitioner's fundamental Sixth Amendment rights. Secondly, Petitioner must show that counsel's errors prejudiced the defense so seriously that counsel's performance compromised Petitioner's right to a fair trial. *Strickland*, 466 U.S. at 687; *Curo v. Becker*, 254 Va. 486 (1997). Petitioners must overcome high hurdles in challenging trial counsel's trial tactics because great deference is given to counsel's judgment and decisions. *Strickland*, 466 U.S. at 690. Attorneys are presumed to have made decisions and acted with reasonable professional judgment. *Id.* at 690-91.

In a collateral attack on a conviction, "a prisoner not only has the burden of proving ineffective assistance of counsel, but also must prove actual prejudice as a result." *Stokes v. Warden*, 226 Va. 111, 118 (1983); *accord Strickland*, 466 U.S. at 687. In order to establish prejudice, there must be a showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside

the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691.

In applying the *Strickland* test, a Petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In determining the existence of prejudice, the court must consider the totality of the evidence presented at the criminal trial. *Id.* at 695; *accord Strickler v. Murray*, 249 Va. 120, 128, *cert. denied*, 516 U.S. 850 (1995).

It is obvious that trial counsel in the immediate case maintained a consistent, yet unsuccessful strategy. However, "effective" representation is not synonymous with "successful" representation. *See Peyton v. Ellsyon*, 207 Va. 423, 426-27 (1966). The question is whether trial counsel's failure to produce certain witnesses, note timely objections, counter evidence of gang affiliation, or raise the alleged conflict effectively denied Petitioner his constitutional right to assistance of counsel. A review of the record in its entirety revealed that trial counsel's presentation of Petitioner's case did not fall below the acceptable level of representation of a defendant. Moreover, the evidence presented by the Commonwealth demonstrated a convincing case of Petitioner's guilt.

A. Exculpatory Witnesses

Petitioner contends that his trial counsel failed to adduce testimony from witnesses, perceived to be exculpatory, that in Petitioner's view would have changed the trial's outcome. Counsel is not ineffective for failing to call an unfavorable witness that may weaken, rather than strengthen, a defense. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

The record indicates that trial counsel did not call certain witnesses because Petitioner's father instructed him not to,

or the witnesses had provided false statements to police. "[W]hen defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. It appears that counsel's trial strategy was to exclude the witnesses in question because in his opinion they would weaken the defense. Petitioner cannot prove prejudice if counsel declined to call a witness whose credibility was subject to impeachment. *See Smith v. Smith*, 931 F.2d 242, 245 (4th Cir. 1991).

B. Objections

Petitioner further argues that counsel was ineffective for failing to object to portions of the Commonwealth's evidence. Specifically, Petitioner claims that trial counsel should have objected to the medical examiner's testimony about cause of death. However, the record indicates that trial counsel maintained a consistent strategy not to object to testimony that would make it appear he was trying to hide something from the jury. Such reasonable, strategic choices are "virtually unchallengeable". *Strickland*, 466 U.S. at 690. Moreover, it is unlikely that counsel's objection to the medical examiner's opinion would have been sustained.

C. "Gang Taint"

Petitioner argues that trial counsel failed to disassociate Petitioner from the taint of gang affiliation and that his questions tended to promote the association. The record reflects that counsel's strategy in navigating the gang overtones in the case was to promote the victim's gang relationship. Petitioner cannot now question this tactic in hindsight, for courts have been reluctant to second-guess trial lawyers' tactics. *See Goodson v. United States*, 564 F.2d 1071, 1072 (4th Cir. 1977). The *Strickland* test requires the reasonable probability that counsel's errors caused an

unreliable trial outcome. *See Strickland*, 466 U.S. at 687. The Petitioner has not proven such probability.

D. Vienna Convention Rights

Petitioner further assails his trial counsel for not advising him of his right to meet with the Honduran consul under the Vienna Convention on Consular Relations. Assuming, without deciding, that such rights exist under the facts of this case, the Court's holding in *Slayton v. Parrigan*, 215 Va. 27, 29 (1974), *cert. denied*, 419 U.S. 1108 (1975) bars this claim because Petitioner had ample time to raise the issue at trial or on appeal.

E. Conflict of Interest

Lastly, Petitioner claims trial counsel allowed a conflict of interest to compromise his representation of Petitioner in violation of Petitioner's Sixth Amendment rights. Petitioner claims that one of the police officers in the case had previously recommended trial counsel's legal services to other members of the community. Petitioner, though, fails to show the alleged conflict of interest actually had an adverse effect on counsel's performance, particularly because the record reflects that counsel had no knowledge of the referrals. *See Mickens v. Taylor*, 122 S. Ct. 1237, 1243-44 (2002) (holding that a defendant must establish that an alleged conflict of interest adversely affected his counsel's trial performance to demonstrate a Sixth Amendment violation).

VI. CONCLUSION

In the final analysis, the Court is of the opinion that only one of Petitioner's claims warrants further review. The record is unclear whether the photograph or videotape of Osorto's statement was in the Commonwealth's possession in time to be of value to Petitioner at his trial or for an immediate post-trial proceeding.

If the photograph or video were available, the Court must further determine whether it was in fact exculpatory.

These issues will require a limited evidentiary hearing. Therefore, Petitioner's Petition with respect to this issue is granted.

The remaining prosecutorial misconduct and ineffective assistance of counsel claims are barred by Virginia habeas corpus law. Accordingly, the Court grants Respondent's Motion to Dismiss with respect to those remaining claims.

Entered this 8 day of August 2002.

/s/

Henry E. Hudson, Judge

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner's Application for a Writ of Habeas Corpus. The Court finds that a limited evidentiary hearing is required with respect to whether certain evidence was in the possession of the Commonwealth, and if so, whether that evidence was exculpatory to Petitioner. It is therefore

ORDERED that the Petition is GRANTED only on the issues of determining whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It is further

ORDERED that the Petition with respect to all remaining issues is DENIED.

Entered this 8 day of August, 2002.

/s/
Henry E. Hudson, Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER AMENDING MEMORANDUM OPINION

After consideration of the Respondent's Motion for Clarification, the Petitioner's response, and argument by the parties, the Court finds that, for the reasons stated to the record, the Motion has merit.

WHEREFORE, it is hereby ORDERED that paragraph V(D) of this Court's Memorandum opinion of August 8, 2002, be and hereby is modified to read as follows:

"D. Vienna Convention Rights

Petitioner further assails his trial counsel for not advising him of his right to meet with the Honduran consul under the Vienna Convention on Consular Relations. Assuming, without deciding, that such rights exist under the facts of this case, this belated claim is barred by the statute of limitations, Code § 8.01-654 (A)(2), and in any event is without merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984)."

This Court notes the petitioner's exception to this action.

The Clerk is directed to forward a certified copy of this order to John C. Kiyonaga, counsel for the petitioner, and to the respondent, H. Elizabeth Shaffer, Assistant Attorney General.

Enter this 3 day of October, 2002.

/s/ Terrence Ney
Judge

I ask for this:

/s/
H. Elizabeth Shaffer, Esq.
Assistant Attorney General
900 East Main Street
Richmond, VA 23219
Counsel for Respondent

Seen:

/s/
John C. Kiyonago, Esq.
526 King Street
Suite 213
Alexandria, Virginia 22314
Counsel for Petition

FAIRFAX COUNTY POLICE DEPARTMENT
SUPPLEMENTARY INVESTIGATION REPORT

Date of Event: 12/10/97
Time of Event: 2025
Case: 97344-001799
Nature: Malicious wounding

COMP
Name: Merry, James
Address: 8064 Tributary Ct., Springfield, VA
Phone Pers: 569-2158
Phone Bus: None
Age: 18 **Race:** W **Sex:** M
Date of Birth: 6/29/79

VICTIM/WITNESS
[BLANK]

ARRESTED/SUSPECT/OTHER
Name: Osorto, Julio C.
Address: 5736 Backlick Rd., #103, Spfld, Va.
Age: 21 **Race:** H **Sex:** M
Date of Birth: 11/25/76
HT: 55-58 **WT:** 160-180
Hair Color: Blk **Eye Color:** Brn
Hair Style: curly on top **Hair Length:** short
Clothing Description: Blk Leather Jacket, Blue Jeans
SSAN: 026200096465

REMARKS

While canvassing the area reference a Malicious Wounding at Springfield Plaza PFC MacCaskill and myself stopped the above listed subject walking down Dinwiddie St. Mr. Osorto had what appeared to be ketchup on his pant legs and a little on his shirt. He claimed he had come

from McDonalds where he had eaten a cheeseburger. Mr. Osorto originally stated he was coming from his cousins residence on Cumberland Ave., then he stated he was coming from Commerce St.

Mr. Osorto stated he was not at Popeyes and he had a slight odor of alcohol upon his breath. He stated he lived at Chelsey Square Apts. but was confused on the address.

Mr. Osorto was identified and NCIC/VCIN checks were negative. Mr. Osorto was issued a Suspension / Revocation form and sent on his way.

TOT-CIB.

The property, the two baseball bats, were handed over to Gary Allen at 0015 hrs.

Date of Report: 12/10/97
Time of Report: 2200
Investigated by: C.J. Mahoney
EIN: 2551

Time Received: 2025
Time Arrived: 2035
Time Cleared: 2130
Approving Supervisor: /s/
EIN: 1145
Date: 12/10/97

Case Status: 6 Active-TOT CIB

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

FINAL ORDER

THIS CAUSE is before this Court on Petitioner's Application for a Writ of Habeas Corpus. Upon consideration of that petition, the motion to dismiss filed by the respondent and the authorities cited therein, the Court, by memorandum opinion and order dated August 8, 2002, ordered an evidentiary hearing limited to the question whether the videotape and photograph were timely available to the Commonwealth and whether the statements therein were exculpatory. It granted respondent's motion to dismiss all remaining claims.

After mature consideration of the foregoing and of the evidence presented at the evidentiary hearing on December 5, 2002, and a review of the record in the criminal case of *Commonwealth v. Mario Bustillo*, Case No. CR-93337, which is hereby made a part of the record in this habeas corpus matter, the Court finds for the reasons stated to the record at the evidentiary hearing that the petitioner is not entitled to the relief sought. The Court concludes that the Commonwealth did not violate the

petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and grants respondent's motion to strike the evidence.

This Court incorporates by reference the August 8, 2002 memorandum opinion and order and its order of October 3, 2002 amending the memorandum opinion.

For the foregoing reasons, the Court is of the opinion that the petition for a writ of habeas corpus should be denied and dismissed; it is, therefore,

ADJUDGED and ORDERED that the petition for a writ of habeas corpus be, and is hereby, denied and dismissed, to which action of this Court the petitioner's exceptions are noted.

The Clerk is directed to forward a certified copy of this Order to petitioner, John C. Kiyonaga, Esq., the respondent, and H. Elizabeth Shaffer, Assistant Attorney General, and Stephen R. McCullough, Assistant Attorney General.

Entered this 21 day of February, 2003.

/s/

R. Terrence Ney, Judge

CIRCUIT COURT OF FAIRFAX COUNTY

MARIO A. BUSTILLO

v.

GENE M. JOHNSON AND
RONALD J. ANGELONE

September 16, 2003

Case No. (Law) 201879

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* * * * *

BY JUDGE R. TERRENCE NEY

This matter came before the Court pursuant to the Petitioner's Motion to Reconsider the Court's Order of February 21, 2003, whereby the Court denied the Petition for Habeas Corpus Relief.

Facts

On December 10, 1997 John Merry was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Petitioner Mario Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998, Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

Trial counsel filed a timely Notice of Appeal from the sentencing order. The Petition for Appeal was denied by

the Court of Appeals of Virginia on April 11, 2000. Bustillo next appealed to the Supreme Court of Virginia, which denied his appeal on January 17, 2001. The United States Supreme Court denied Bustillo's writ of certiorari on June 4, 2001.

Bustillo subsequently filed a Petition for a Writ of Habeas Corpus in the Fairfax Circuit Court claiming, among other things, that the Commonwealth had engaged in several acts of prosecutorial misconduct.[1] Specifically, Bustillo alleged that the Commonwealth:

1. Failed to disclose exculpatory evidence;

2. Engaged in improper and suggestive witness coaching;

3. Threatened and intimidated witnesses in exchange for incriminating testimony;

4. Failed to inform Petitioner of his Vienna Convention rights;

5. Had improper contact with a member of the jury; and

6. Prejudicially promoted Petitioner's alleged "gang" affiliation at trial.

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required with respect to whether certain evidence, namely a videotape and photograph of an individual named "Sirena" who the defense claimed was responsible for the crime, was in the possession of the Commonwealth and, if so, whether such evidence was exculpatory in nature.[3]

An evidentiary hearing on the issues of the videotape and photograph was set for December 5, 2002. Prior to the

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[1] Petitioner also raised the claim of ineffectiveness of counsel.

[2] The Honorable Henry E. Hudson presided over the August 8, 2002, evidentiary hearing.

[3] The Petition with respect to all other issues raised was denied.

hearing, this Court granted various discovery requests[4] made by the Petitioner, including:

1. The production of the photograph of "Sirena" by the Commonwealth, if found;

2. The identity of any official of the Fairfax County Police Department, the investigative, or prosecution team who possessed it;

3. Any information possessed by the Fairfax Police Department pertaining to "Sirena," a.k.a. Julio Cesar Osorto Herrera; and

4. The investigative notes of Fairfax County Police Detective Richard J. Cline.

Pursuant to these discovery orders,[5] the Commonwealth produced to counsel for Bustillo a photograph of "Sirena," a copy of Detective Cline's notes of an interview with witness Jose Armando Amaya ("Amaya") dated January 7, 1998,[6] and a copy of Fairfax County Police Officer C. J. Mahoney's investigative report dated December 10, 1997, documenting his stop of an individual named Julio Osorto.[7] None of these

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[4] See this Court's Orders dated October 2, 2002, and November 15, 2002.

[5] *Id.*

[6] The notes of Detective Cline contain scattered references to "Sirena" as a person present at the scene. According to Detective Cline's notes dated January 7, 1998, Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. # 3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997, contain the following notation: "Sirena Julio" as being one of the persons present at the scene.

[7] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant.

items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, the Court heard evidence regarding the videotape and photograph of "Sirena," and, in particular, when the Commonwealth obtained such evidence. Finding that neither the videotape nor the photograph were obtained by the Commonwealth during the investigation or prosecution, but rather were obtained post-trial,[8] and, as a result, the Commonwealth had no obligation under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), to turn over the videotape or the photograph to the defense, the Court denied the Petition for a Writ of Habeas Corpus. After hearing evidence, the Court took the matter under advisement. The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on the evidence furnished to the Petitioner by virtue of the discovery orders, in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

On March 13, 2003, the Court issued a Suspending Order tolling the running of the twenty-one day period in order to conduct a further review of the matter.

Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[8] In a sworn affidavit dated April 29, 2002, Officer Abraham Gelabert testified that he "found the photograph [of Sirena] after trial." In addition, the evidence before the Court demonstrated that the videotape was initially procured by Petitioner's counsel and was subsequently furnished to the Commonwealth on March 5, 1999, almost one year *after* the trial.

Analysis

The issue before the Court is two-fold, namely whether Detective Cline's notes and/or Officer Mahoney's Report constitute exculpatory evidence, and if so, whether the disclosure of such evidence to the defense would have resulted in a different outcome at trial.

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

Evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Id.*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6, 133 L. Ed. 2d 1, 116 S. Ct. 7 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919).

A petitioner has the burden of showing that, when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's guilt. *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v. Commonwealth*, 232

Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990). Thus, in order for Bustillo to be granted habeas corpus relief, this Court must find that (1) the Mahoney Report and/or Detective Cline's notes constitute exculpatory evidence and (2) the exculpatory evidence is material.

Exculpatory Nature of the Mahoney Report and Detective Cline's Notes

Under *Brady*, exculpatory evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Bagley*, 473 U.S. at 676.

Bustillo argues that prior to the 1998 trial, the Commonwealth's Attorney was well aware of the defense's theory that someone other than Bustillo, namely "Sirena," a.k.a. Julio, had committed the murder of John Merry. Indeed, that was the thrust of the defense case. Bustillo further alleges that not only was the Commonwealth fully aware that "Sirena" also went by the name of "Julio,"[9] but that the Commonwealth was also made aware that "Sirena" and Julio *Osorto* were one and the same person through Officer Mahoney's Report and Detective Cline's interview notes.[10] In addition, the Commonwealth was certainly

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[9] In a letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney Todd Sanders disclosed that "Sirena" was also known as "Julio," but did not further identify the latter.

[10] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived in Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998, state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002, hearing, the Commonwealth argued that it made no connection between the two men and did not know that "Sirena," a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

aware that Merry's blood was found at the scene where he had been assaulted.

Hence, Bustillo argues that Detective Cline's notes, in particular the note equating Julio and Sirena,[11] the note indicating that Sirena held a "cocked" bat,[12] and the note documenting the Chelsea Square Apartment address,[13] and Officer Mahoney's Report, which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission, must be deemed exculpatory. Notwithstanding the Commonwealth's alleged inability to equate "Sirena" with Julio Osorto prior to trial, the Petitioner asserts that the contents of the Mahoney Report and Detective Cline's notes, standing alone, are exculpatory, thereby requiring their disclosure prior to trial.

1. *Julio Osorto – Sirena*

Although not the prime focus of the December 5, 2002 evidentiary hearing, the testimony suggested that the police may not have known prior to trial that "Sirena," the individual referenced by Amaya during his interview with Detective Cline and later identified by others as the assailant,[14] and Julio Osorto, the individual stopped by Officer Mahoney near the crime scene the night Merry was assaulted, were one and the same person. Nor would any reasonable police officer necessarily have made the connection with the

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[11] See Detective Cline's notes of an interview with Nicholas Parada dated December 18, 1998.

[12] See Detective Cline's notes of his interview with Amaya dated January 7, 1998.

[13] See note 9, *supra*.

[14] At the post-trial hearing for a new trial held on July 13, 1998, several witnesses came forward and testified that "Sirena" was the assailant. See Testimony of Giovany Hernandez, Tr. 07/13/98, p. 20; Testimony of Marvin Escobar, Tr. 07/13/98, pp. 40-43; Testimony of Jose Maldonaldo, Tr. 07/13/98, pp. 56, 57.

facts available to them at the time.[15] Although Amaya referenced an individual named "Julio" during his interview with Detective Cline,[16] nowhere in Detective Cline's notes is "Julio" identified as "Julio Osorto."[17] As such, the Commonwealth testified that it had no reason to suspect or believe prior to trial that either the Mahoney report or those portions of Detective Cline's notes referencing "Julio," standing alone, were exculpatory in nature. The Commonwealth is charged with knowledge of what was contained in *both* reports. *Fitzgerald v. Bass*, 6 Va. App. 38, 50, 366 S.E.2d 615, 622 (1988) (constructive knowledge is attributed to the prosecutor where the information is in possession of the police) (citations omitted).

Turning to the specific evidence, the Commonwealth was certainly aware that Detective Cline conducted several pretrial interviews with various eyewitnesses, as the Commonwealth had Detective Cline testify at trial regarding his interviews with witnesses who had identified Bustillo as the assailant. The Commonwealth was also aware of Detective Cline's pretrial interview with Amaya, as the Assistant

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[15] As the evidence presented at the December 5, 2002, hearing demonstrated, the police did not even have in their possession a photo of "Sirena" until months after the trial. After-discovered evidence does not constitute a basis for habeas relief. *Fitzgerald v. Bass*, 6 Va. App. 38, 366 S.E.2d 615 (1988).

[16] See *supra*.

[17] Petitioner's contention that reference to the Chelsea Square Apartments in both the Mahoney Report and Detective Cline's notes serve to put the Commonwealth on notice that "Sirena" and Julio Osorto were one and the same person, thus rendering the Mahoney Report and Detective Cline's notes exculpatory, is not dispositive. Two persons listing the same address as their place of residence does not necessarily dictate that such persons are one and the same. Certainly more than one person may occupy a particular residence at the same time.

Commonwealth Attorney summarized the contents of that interview in a letter sent to defense counsel prior to trial.

Similarly, the Commonwealth knew, or is charged with knowing, of the existence of the Mahoney report prior to trial. Yet the Commonwealth offered no explanation as to why Detective Cline's notes or the Mahoney Report were not produced to defense counsel other than the argument that the information contained within Detective Cline's notes and the Mahoney Report was not exculpatory.

The Commonwealth should have known, given the contents of the investigative notes and the police report, that "Sirena-Julio" and Julio Osorto might be one and the same person. Both the Mahoney Report and Detective Cline's notes unquestionably implicate "Sirena," a.k.a. Julio, and "Julio" Osorto, as a possible suspect. The Commonwealth should have made the connection, especially given the defense's insistence that "Sirena"/"Julio" was the assailant.

Moreover, although the Commonwealth disclosed to the defense prior to trial that Sirena was observed at the scene the night Merry was assaulted and that "Sirena's first name appears to be Julio,"[18] it failed to disclose that Amaya also told Detective Cline that he observed Sirena holding a bat in a "cocked" position. This latter piece of information not only makes clear that Sirena was present at the scene, but also implicates Sirena as the actual assailant.

As such, evidence that "Sirena-Julio" was observed approaching the victim and holding a bat in a "cocked" position and evidence that an individual named Julio Osorto was stopped by an officer on the night of the assault near

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[18] In his letter to defense counsel dated March 9, 1998, Sanders informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats."

the crime scene with red stains on his clothing must be deemed exculpatory.

2. *Stop of Julio Osorto*

With respect to the "ketchup stains" observed on Julio Osorto's clothing and referenced in the Mahoney Report, the evidence presented at trial was unclear as to a finding of blood *spatter* at the time Merry was struck. The Commonwealth's uncontradicted expert testimony at trial demonstrated that the fatal blow to the victim's head resulted in a closed head wound.[19] Yet the evidence also showed that there was blood at the scene,[20] including photographic evidence of what appeared to be blood spatter.

Given all of the evidence presented at trial concerning the nature of the victim's injury, which admittedly includes the absence of blood on the victim, the absence of blood on the bats, and the absence of blood on Bustillo, but yet with photographs of the crime scene depicting what appears to be blood spatter, and testimony identifying "Sirena-Julio" as the assailant, the Court finds that the information contained within Mahoney's Report, namely the stopping of a "Julio" near the crime scene at the time of the incident with red stains on his clothes, is exculpatory in nature warranting its production to the defense prior to trial.

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[19] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98, p. 131 (Michelle Gutierrez); Tr. 3/18/98, p. 222 (Jesse Konstanty); Tr. 3/18/98, p. 264 (Nicholas Parada); Tr. 3/18/98, p. 27 (Valeria Landaeta); Tr. 3/18/98, pp. 100, 111 (Amilcar Amaya); Tr. 3/18/98, p. 142 (Christina Hondoy). In addition, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98, p. 193.

[20] Dr. Frances Field further testified that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear then out of the ear canal. Tr. 3/17/98, p. 193.

Materiality of the Mahoney Report and Detective Cline's Notes

Notwithstanding the exculpatory nature of Detective Cline's notes and the Mahoney Report, a new trial is not automatically required whenever [ ] "a combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States*, 405 U.S. 150, 31 L.Ed. 2d 104, 92 S. Ct. 763 (1972). In other words, the Petitioner still must establish the materiality of such evidence.

As previously stated, implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial. *Bagley*, 473 U.S. at 676. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528, citing *United States v. Agurs*, 427 U.S. at 109-10. Rather, evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed, the result of the trial would have been different. *Id.*, 255 Va. at 464, 499 S.E. at 519, citing *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In further defining the materiality standard, the *Strickland* Court explained that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695. In determining whether Bustillo has established a "reasonable probability" that disclosure of Detective Cline's notes

and/or the Mahoney Report to the jury would have [a]ffected the outcome of the trial, the Court considers the exculpatory evidence in context with the existing record.

First, although there is no manifest connection between the "Julio" stopped by Officer Mahoney and the assault of John Merry, Bustillo has shown that Julio Osorto was present in the general vicinity of where the crime occurred, near the time of the assault, with what appeared to be "ketchup stains" on his shirt and pants. Additionally, both Officer Mahoney's notes and Detective Cline's notes reference the Chelsea Square Apartments with respect to "Julio's" reported residence.

Second, in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a "Sirena," the jury would still have to disregard the substantial evidence presented at Bustillo's criminal trial that Bustillo was the assailant.

For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrrez testified that both "Sirena" and Bustillo were present at the crime scene[21] and that Bustillo was the one who took a bat and struck the victim.[22] Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant.[23]

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[21] Testimony of Michele Gutierrez, Tr. 03/17/1998, p. 129.

[22] *Id.*, Tr. 03/17/98, p. 131.

[23] Testimony of Jesse Konstanty, Tr. 3/17/98, p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98, p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98, p. 36.

In addition, Detective Cline testified about his pre-trial interview with Nicholas Parada ("Parada"),[24] who was present at the scene the night of the assault. Parada told Detective Cline that he observed "[Bustillo] standing there with a bat and the victim had fallen to the ground."[25] Detective Cline further testified that when he interviewed Parada on December 18, 1997, Parada told him that he actually saw Bustillo "swinging the bat . . . he saw the bat swinging and he saw the person drop to the floor or to the ground. But [Parada] did indicate that he didn't actually see him strike the victim [although] he did see him swinging the bat in that direction." Testimony of Detective Cline, Tr. 03/18/98, p. 52. Detective Cline also stated that among all the people he interviewed at the crime scene the evening of the assault, "Mario" was the only one everybody identified as having swung the bat. Tr. 03/18/98, p. 53.

Petitioner points out that Nicholas Parada testified at trial that, although he did not see the assault, he did see Bustillo swing the bat in the direction of the victim. Tr. 03/17/98, p. 271. Petitioner contends that this observation recounts precisely the same act as that reported by Amaya in his interview with Detective Cline on January 7, 1998, which Amaya attributed to Sirena.

The jury, however, also heard testimony during the trial implicating "Sirena" as the assailant. Testifying for the defense, Amilcar Amaya[26] stated that he was outside the Popeye's when he saw "Senior Julio"[27] *also known as*

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[24] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[25] Testimony of Detective Cline, Tr. 03/18/98, p. 51.

[26] Amilcar Amaya is not the same person as Jose Armando Amaya referred to in Detective Cline's notes dated January 7, 1998.

[27] Amilcar Amaya indicated that he did not know "Julio's" last name.

"*Sirena*" take a bat and strike the victim.[28] Esmirna Hondoy also testified that she was at Popeye's and witnessed the assault. Although she could not identify the assailant, she testified that Bustillo was *not* the one who attacked the victim.[29]

The jury, having heard evidence in support of both theories, that the assailant was either Bustillo or Sirena/Senior Julio, believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury. *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

Notwithstanding, the Court, in addressing the materiality issue on habeas review, must consider what defense counsel could have done or might have done differently had Detective Cline's notes and/or the Mahoney Report been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury. *Evans-Smith v. Taylor*, 30 Va. Cir. 116 (Loudoun County, 1993).

With respect to the first aspect, it is reasonable to assume that, had the defense known about Amaya's statement

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[28] Testimony of Amilcar Amaya, Tr. 03/18/98, p. 99, 100-01, 110-11.

[29] Testimony of Esmirna Hondoy, Tr. 03/18/98, p. 142-43. Officer Bayliss, who was also called to testify for the defendant and was the first officer to arrive at the Popeye's the night of the crime, stated that when he spoke with Hondoy that night, she told him that the assailant was "Mario" and that Mario took the bat from another individual named Lisandro Parada. Testimony of Officer Bayliss, Tr. 03/18/98, p. 185. Detective Cline gave similar testimony in rebuttal. Testimony of Detective Cline, Tr. 03/18/98, p. 189.

to Detective Cline regarding his observation of Sirena's holding a "cocked bat" and the police stop of Julio Osorto on the night of the assault, then the defense would have sought to have had Amaya, Officer Mahoney, and Julio Osorto testify on its behalf. Alternatively, in the event that such witnesses were unavailable to testify, defense counsel may have sought to have had Detective Cline's notes and/or the Mahoney Report introduced into evidence at trial to further support the defense theory that Julio/Sirena, not Bustillo, was the actual assailant. The Court does not opine on the admissibility of either Detective Cline's notes or the Mahoney Report and in particular whether such reports, if deemed hearsay, would fall under any of the exceptions to the hearsay rule.

Furthermore, with respect to the "ketchup stains" referenced in the Mahoney Report, the trial record is devoid of evidence that the victim suffered an open-head wound or testimony as to blood spatter, save the photographic evidence of what appeared to be blood at the scene. But Officer Mahoney's observations of "what appeared to ketchup on [Julio Osorto's] pant legs and a little on his shirt," when coupled with the photographs, tend to belie the evidence presented in support of the Commonwealth's closed head wound theory. With the Mahoney Report in hand, the defense might have further developed its theory of the case, namely, that the victim suffered an open head wound at the moment of impact and that the wound resulted in the transfer of the victim's blood to the assailant.

Third, the Court has to consider the effect that Detective Cline's notes, in particular Amaya's statement, and the Mahoney Report would have had on the result of the trial had such evidence been presented to the jury. While certainly arguable either way, additional corroborating witnesses for the defense might have bolstered its theory

that Sirena was the actual assailant.[30] In addition, evidence of what may have been blood on Julio Osorto might have cast doubt not only on the Commonwealth's closed head wound theory, but also on Bustillo's guilt.

Conclusion

Upon review of the entire record and a full consideration of the issues, the Court finds that the information contained within Officer Mahoney's Report and the information contained within Detective Cline's notes, documenting Julio Osorto/Sirena's presence and actions at the crime scene, are exculpatory and thus should have been disclosed to the defense prior to trial.

As to whether the notes of Detective Cline and Officer Mahoney show a reasonable probability that, had such evidence been disclosed to the defense, the result of the criminal trial might have been different, the Court is unwilling at this time to set aside the verdict and order a new trial absent further evidence as to such a probability. In order to properly determine whether disclosure of the police investigative notes and report to the jury would have affected the outcome of trial, the Court finds that a limited hearing on the issue of materiality is warranted in determining whether Bustillo has established that he is entitled to habeas relief.

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[30] As the Petitioner points out, Amaya's testimony certainly would not have been cumulative, as there was only one other defense witness (Amilcar Amaya) to inculpate Sirena as the assailant. In addition, the Commonwealth referred more than once in closing argument to the fact that the defense produced only one eyewitness to name the assailant in comparison to the several witnesses identifying Bustillo as the assailant. The Petitioner argues that Amilcar Amaya's testimony was ultimately rejected by the jury because of the lack of any corroborating witnesses.

The Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending further proceedings.

Order

This matter came before the Court pursuant to Petitioner's Motion for Reconsideration of this Court's February 21, 2003, Order, whereby the Court denied the Petition for a Writ of Habeas Corpus subsequent to a limited evidentiary hearing held on December 5, 2002. On March 13, 2003, the Court entered a Suspending Order tolling the running of the twenty-one day period to conduct a further review of the matter. For the reasons stated in this Court's opinion letter dated September 16, 2003, which is attached hereto and made a part hereof, the Petitioner's Motion to Reconsider is granted and the Petition for Habeas Corpus Relief remains on the Court's docket pending a limited evidentiary hearing on the issue of materiality.

[Judicial Seal Omitted]

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

May 4, 2004

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Re: *Mario Bustillo v. Gene M. Johnson*, at Law
No. 201879

Dear Counsel:

Pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief, this matter came before the Court on April 7, 2004 for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence

the Commonwealth of Virginia failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

FACTS

On December 10, 1997 James Merry ("Merry") was struck in the head with a baseball bat outside a Popeye's Restaurant in Springfield, Virginia. Merry died several days later as a result of his injuries.

On March 20, 1998 a jury found Bustillo guilty of first degree murder and sentenced him to thirty years in the penitentiary. On June 20, 1998 Bustillo made a Motion to Set Aside the Verdict. After an evidentiary hearing, the trial court denied Bustillo's motion and imposed the sentence recommended by the jury.

After exhausting all of his appeals, Bustillo filed a Petition for a Writ of Habeas Corpus asserting, among other things, that the Commonwealth failed to disclose exculpatory evidence.[1]

On August 8, 2002 the Court[2] granted the Petition, in part, finding that a limited evidentiary hearing was required to determine whether the Commonwealth possessed at the time of trial a photograph and videotaped confession of "Sirena," an individual who the defense said was responsible for the crime, and, if so, whether such evidence was exculpatory in nature.[3]

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[1] In his Petition for Habeas Relief, Bustillo also alleged that the Commonwealth engaged in improper and suggestive witness coaching; threatened and intimidated witnesses in exchange for incriminating testimony; failed to inform Petitioner of his Vienna Convention rights; had improper contact with a member of the jury; and prejudicially promoted Petitioner's alleged "gang" affiliation at trial. In addition, Bustillo claimed ineffectiveness of counsel.

[2] On August 8, 2002 the Honorable Henry E. Hudson issued a Memorandum Opinion and Order.

[3] The Petition with respect to all other issues raised was denied.

The evidentiary hearing was set for December 5, 2002. Prior to the hearing, this Court granted various discovery requests[4] made by Bustillo. Pursuant to the discovery orders,[5] the Commonwealth produced a photograph of "Sirena", a copy of Detective Cline's notes of an interview with one Jose Armando Amaya ("Amaya") dated January 7, 1998,[6] and a copy of Fairfax County Police Officer C.J. Mahoney's ("Mahoney") investigative report dated December 10, 1997 documenting his stop of an individual named Julio Osorto.[7] None of these items had been disclosed to the defense prior to the 1998 trial.

On December 5, 2002, after finding no evidence that the Commonwealth possessed either a photograph or videotaped confession of Sirena at the time of trial, the Court denied the Petition for a Writ of Habeas Corpus.[8]

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[4] See this Court's Orders dated October 2, 2002 and November 15, 2002.

[5] *Id.*

[6] According to Detective Cline's notes dated January 7, 1998 Amaya told him that both Bustillo and "Sirena" were present at the Popeye's Restaurant on December 10, 1997, and that Amaya observed "Sirena" at the scene with a "bat cocked." The notes also reflect that Amaya stated that an individual identified as "Julio" was staying at the Chelsea Square Apartments, Apt. #3 with an individual named Cruz Argueta, but that he left the area on December 31, 1997. In addition, Detective Cline's notes dated December 18, 1997 contain the following notation: "Sirena – Julio" as being one of the persons present at the scene.

[7] According to Officer Mahoney's Report, Officer Mahoney stopped and questioned an individual named Julio Osorto shortly after the crime while canvassing the area near the Popeye's Restaurant. Osorto appeared to have "ketchup stains" on his pants and shirt. Osorto indicated that he lived at the Chelsea Square Apartments, "but was confused on the address." Officer Mahoney issued Osorto a suspension/revocation form and released him.

[8] The Court issued its Order denying the Petition for a Writ of Habeas Corpus on February 21, 2003.

In response, Bustillo filed a Motion to Reconsider based on evidence furnished by virtue of the Court's 2002 discovery orders,[9] in particular Detective Cline's notes from his interview with Amaya and Officer Mahoney's Report regarding the stop of Osorto.

On September 16, 2003 the Court granted Bustillo's Motion to Reconsider, finding that the information contained in Detective Cline's notes—in particular the note equating Julio and Sirena,[10] the note indicating that Sirena held a "cock[ed]" bat,[11] and the note documenting the Chelsea Square Apartment address,[12]—and the information contained in Officer Mahoney's Report—which stated that Julio Osorto bore "what appeared to be ketchup" on his clothes when he was questioned shortly after the crime near the place of its commission—were exculpatory in nature and therefore should have been disclosed to the defense prior to trial.

With respect to the issue of materiality, the Court declined to set aside the verdict and order a new trial absent further evidence as to the probability that, had the evidence been disclosed to the defense, the result of the criminal trial might have been different.

A limited hearing on the issue of materiality was held on April 7, 2004.

ANALYSIS

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irre-

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[9] See note 4, *supra*.

[10] See Detective Cline's notes of interview with Nicholas Parada dated December 18, 1998.

[11] See Detective Cline's notes of his interview with Jose Armando Amaya dated January 7, 1998.

[12] *Id.* See also note 39, *infra*.

spective of the good faith or bad faith of the prosecution.[13] Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[14]

A reasonable probability has been defined as a "probability sufficient to undermine confidence in the outcome."[15] Thus, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."[16] Rather, a petitioner has the burden of showing that when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding the petitioner's guilt.[17]

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[13] *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 519 (1998), citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[14] *Id.*, citing *United States v. Bagley*, 473 U.S. 667 (1985). In addition, evidence that is inadmissible at trial is not true "evidence" for *Brady* purposes. *Soering*, 255 Va. at 464, 499 S.E.2d at 517 (1998), citing *Wood v. Bartholomew*, 516 U.S. 1, 5-6 (1995). Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible. *Karnes v. Commonwealth*, 125 Va. 758, 766, 99 S.E. 562, 565 (1919). Only when the proffered evidence tends to clearly point to some other person as the guilty party will such proof be admitted. *Id.*

[15] *Bagley*, 473 U.S. at 682, quoting *Strickland v. Washington*, 466 U.S. 668 (1984). In further defining the materiality standard, the *Strickland* Court explained that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent errors, the factfinder would have had a reasonable doubt respecting guilt." 466 U.S. at 695.

[16] *Soering*, 255 Va. 457, 465, 499 S.E.2d 514, 528, citing *United States v. Agurs*, 427 U.S. at 109-110.

[17] *See United States v. Bagley*, 472 U.S. at 682; *see also United States v. Agurs*, 427 U.S. 97, 112-13 (1976). The *Bagley* approach has been adopted by the Supreme Court of Virginia, *Correll v. Com-*

In addition, the Court—in addressing the materiality of exculpatory evidence on habeas review—may consider what defense counsel could have done or might have done differently had the evidence been revealed to the defense prior to trial *and* what the effect would have been on the result of trial had such evidence been presented to the jury.[18]

In support of the materiality of Detective Cline's notes and the Mahoney Report, Bustillo called four witnesses to testify about the presence of Sirena and/or blood spatter at the crime scene, matters which purportedly would have been further explored at trial and might have led to a different outcome had the Commonwealth disclosed the evidence to the defense.

Dr. Peter Bernad

Dr. Peter Bernad ("Dr. Bernad"), a licensed neurologist who reviewed Merry's autopsy report and treatment records in preparation for the April 7, 2004 hearing,[19] described Merry's injuries as severe blunt trauma to the left side of the head, multiple fractures, and destruction of bone and blood vessels.[20]

Dr. Bernad further testified that the blow to Merry's head likely resulted in a ruptured eardrum, thus allowing blood to "seep" out of the left ear canal.[21] With respect to time involved, Dr. Bernad explained that the blood would have had "significant velocity" to push through the tym-

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monwealth, 232 Va. 454, 352 S.E.2d 352 (1987), and the Court of Appeals of Virginia, *Carter v. Commonwealth*, 10 Va. App. 507, 393 S.E.2d 639 (1990).

[18] *William Evans-Smith v. John B. Taylor*, 30 Va. Cir. 116 (Loudoun County Circuit Court, 1993).

[19] Dr. Frances Field, not Dr. Bernad, was the medical examiner who performed the autopsy of Merry in 1998.

[20] See testimony of Dr. Peter Bernad, April 7, 2004.

[21] *Id.*

panic membrane and exit the ear, and that given the injury sustained, bleeding would have occurred "almost immediately" after impact.[22]

On cross-examination, however, Dr. Bernad testified that he was not an expert on blood spatter.[23] In addition, he conceded that while blood may have aerated from the ear immediately upon impact, it was also possible that given such an injury, it could have taken a couple of seconds for blood to "seep" from the ear.[24] Moreover, Dr. Bernad testified that Merry's injury would not have produced a significant amount of bleeding.[25]

In reviewing Dr. Bernad's testimony in light of the existing record, including the crime scene photos, the prior testimony of the Commonwealth's expert regarding Merry's injuries,[26] and the prior testimony of several eyewitnesses,[27] his testimony fails to give rise to a reasonable doubt with respect to the nature of Merry's injuries and the closed head wound evidence shown by the Commonwealth.

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] At the 1998 trial, Dr. Frances Field, the medical examiner, noted that there was no breaking of the skin where the injury took place. See Tr. 3/17/98 p. 193. Dr. Frances Field further testified—consistent with Dr. Bernad's testimony—that bleeding from the ear after being struck would not be unusual with the victim's type of injury because the skull fracture could cause blood to seep into the inner ear and then out of the ear canal. Tr. 3/17/98 p. 193.

[27] All the witnesses at trial agreed that the assailant struck a single blow with the bat and took off running. See Tr. 3/18/98 p. 131 (Michelle Guiterrez; Tr. 3/18/98 p. 222 (Jesse Konstanty); Tr. 3/18/98 p. 264 (Nicholas Parada); Tr. 3/18/98 p. 27 (Valeria Landaeta); Tr. 3/18/98 p. 100, 111 (Amilcar Amaya); Tr. 3/18/98 p. 142 (Christina Hondoy).

Notwithstanding Dr. Bernad's testimony that blood would have "sprayed/aerated" from the victim's ear at some point upon or almost immediately after impact, the crime scene photos revealed no signs of blood "spray," "spatter" or droplets, but rather only a few sizable drops of blood, the latter of which the Court finds consistent with blood seepage, not blood spatter.

Yahayra Quierola

Yahayra Quierola ("Quierola"), purportedly present at the Popeye's Restaurant the night Merry was attacked,[28] testified that upon hearing a "noise," she turned and saw blood on Merry's face and ears.[29] She further testified that her friend "Christina," also present at the scene, had droplets of blood on her shirt after the attack.[30]

On cross-examination, Quierola testified that she saw blood coming from Merry's ears only, in contradiction to a prior statement she made under oath that she saw "blood explode from [Merry's] ears, nose and throat."[31] In addition, Quierola could not recall when or how quickly the blood began to "spurt" from Merry's ears.[32]

The Court does not find Quierola's testimony either persuasive much less dispositive on any issue of materiality with respect to either Detective Cline's notes or the Mahoney Report.

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[28] Quierola did not testify at the 1998 trial. At the post-trial hearing hearing held on July 13, 1998, she identified a photo of Sirena and testified that he "looked like the assailant."

[29] See testimony of Yahayra Quierola, April 7, 2004.

[30] *Id.*

[31] *Id.*

[32] *Id.* Interestingly, only this witness testified to observing blood coming from *both* of Merry's ears.

Amilcar Amaya

Next, Amilcar Amaya ("Amaya") testified that he saw Julio Osorto a/k/a Sirena strike Merry with a baseball bat,[33] and that upon impact, he observed blood spray "in the direction of" and "over" Sirena.[34]

The Court does not find Amaya's testimony credible. First, although Amaya testified that he saw blood spray toward Sirena upon impact—suggesting that it was on Sirena's shirt—Amaya later clearly testified that he did *not* observe any blood on Sirena's shirt.[35]

Second, Amaya's testimony is inconsistent with his prior testimony. Neither at the 1998 trial nor in his post-trial affidavit(s) did Amaya testify about the presence of blood at the moment of impact.[36]

Absent credible testimony regarding the presence of blood on Sirena's shirt, the materiality of Mahoney's Report is wanting. In addition, although Detective Cline's notes—which reference "Sirena"—corroborate Amaya's testimony regarding Sirena's presence at the scene, they also place *Bustillo* at the scene, a fact plainly at odds with his alibi defense. As a result, the Court finds that Bustillo fails to demonstrate a reasonable probability that, but for the Commonwealth's nondisclosure of the notes, the result of the proceeding would have been different.[37]

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[33] See testimony of Amilcar Amaya, April 7, 2004. At the 1998 trial, Amaya testified that he was outside the Popeye's when he saw "Senior Julio" *also known as "Sirena"* take a bat and strike the victim. See testimony of Amilcar Amaya, Tr. 03/18/98 p. 99, 100-101, 110-111.

[34] See testimony of Amilcar Amaya, April 7, 2004.

[35] *Id.*

[36] See note 41, *infra*.

[37] The Court also notes that in order to entertain a reasonable doubt based on the theory that Merry was assaulted by Julio Osorto, a.k.a. "Sirena", the jury would still have to disregard the substantial

David Bernhard

Lastly, David Bernhard ("Bernhard"), Bustillo's defense attorney at trial, was called to testify about possible defense strategies that might have been employed had the Commonwealth produced Detective Cline's notes and the Mahoney Report.

During the 1998 trial, the defense, relying primarily on an alibi defense, also argued that someone other than Bustillo, namely "Sirena", a.k.a. Julio, had struck and killed Merry.

In addressing the materiality of the undisclosed evidence, Bernhard testified that he was "shocked" to learn of the existence of Detective Cline's notes and the Mahoney Report because both tended to corroborate the existence and presence of Sirena at or near the crime scene shortly after the attack.[38] Bernhard further testified that had he possessed the exculpatory documentation at the time of trial, he likely would have called Officer Mahoney to testify

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evidence presented at the 1998 trial that Bustillo was the assailant. For example, several eye-witnesses testified at the 1998 criminal trial that Bustillo was the assailant. Michele Gutierrez testified that both "Sirena" and Bustillo were present at the crime scene and that Bustillo was the one who took a bat and struck the victim. Testimony of Michele Gutierrez, Tr. 03/17/1998 p. 129-131. Jesse Konstanty and Valeria Landaeta also testified that Bustillo was the assailant. Testimony of Jesse Konstanty, Tr. 3/17/98 p. 222; Testimony of Valeria Landaeta, Tr. 3/18/98 p. 20-21. In addition, Valeria Landaeta testified on cross-examination that she told Detective Cline a week before the trial that she was certain the assailant was Bustillo "when she saw his face outside" the Popeye's Restaurant. Tr. 3/18/98 p. 36.

[38] See testimony of David Bernhard, April 7, 2004. Bernhard testified that in preparing for trial, the defense had difficulty finding evidence to corroborate the existence of an individual named "Sirena" and/or his presence at the Popeye's Restaurant the night Merry was attacked.

as to the presence of Sirena at or near the crime scene the night of the attack.[39]

In addition, Bernhard testified that with Detective Cline's notes and the Mahoney Report in hand – both of which contained references to the "Chelsea Square Apartments" and an individual named "Julio" – he might have "put something together" and determined that the "Julio" referenced in Detective Cline's notes and Julio Osorto referenced in the Mahoney Report were one and the same person, namely Sirena.[40]

Bernhard also testified that the Mahoney Report, which recorded the police stop of Julio Osorto with what appeared to be "ketchup stains" on his shirt, provided evidence of possible blood spatter in contradiction to the Commonwealth's expert testimony in support of a closed head wound. He said that he would certainly have "followed the matter up" further.[41] Even so, Bustillo's expert and lay testimony offered at the hearing failed to place blood on

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[39] *Id.* Bernhard further testified that, at trial, the Commonwealth made several references to the fact that the defense called only one witness in support of its position that Sirena, not Bustillo, was the assailant. Had the defense called Officer Mahoney to the stand to testify in support of its theory that Sirena was the actual assailant, Bernhard testified that this corroboration would have "enhanced" the defense's position.

[40] Officer Mahoney's Report on Julio Osorto reads, "[Osorto] stated that he lived at Chelsea Square Apts." Detective Cline's notes of his interview with Amaya on January 7, 1998 state that "Sirena" had been staying at "Chelsea Sq. Apt. 3." At the December 5, 2002 hearing, the Commonwealth argued that it made no connection between the two men and did not know that "Sirena", a.k.a. "Julio" was in fact Julio Osorto until months after the trial.

[41] Bernhard testified that, absent the Mahoney Report, he purposefully did not question witnesses at trial about Merry's injury or the presence of blood in order to reduce the risk of inflaming the jury.

Sirena or otherwise contradict the Commonwealth's expert testimony. If anything, the evidence was corroborative. In either case, it did not undermine confidence in the jury verdict.

Most importantly, notwithstanding all the information that might have been plumbed from Detective Cline's notes and the Mahoney Report, Bernhard nonetheless testified that he was not certain that either document "would have borne any fruit" or have "changed the outcome" of the trial. In fact, Bernhard testified that, even absent Detective Cline's notes and the Mahoney Report—both of which documented "Sirena" and/or "Julio's" presence at or near the crime scene—he was fully aware of other potential witnesses who could corroborate the existence of Sirena and place Sirena at the scene of the crime, including Jose Armando Amaya.[42] Notwithstanding, Bernhard made a "strategic decision" not to call those witnesses to testify.[43] Bernhard's commendable candor with the Court, especially when coupled with the respect he enjoys from the Court, was instrumental in addressing the fundamental issue presented.

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[42] In his letter to defense counsel dated March 9, 1998, the Assistant Commonwealth's Attorney, Todd Sanders, informed the defense that "Jose Armando Amaya told [Detective Cline] that he saw the defendant and Sirena at the scene and both had bats." In the same letter, Sanders also disclosed that "Sirena" was also known as "Julio".

[43] Bernhard testified that he was aware of several witnesses with "dubious credibility" who might have corroborated Sirena's existence and presence at the scene, but that the defense decided against calling such witnesses at trial, in particular Jose Armando Amaya, who had been detained by the authorities. Bernhard testified that he was "instructed by his client" not to talk to Jose Amaya, and that the defense viewed him as an "evidentiary threat," fearing that he would work with the prosecution in exchange for his freedom.

CONCLUSION

The jury, having heard evidence in support of both theories—that the assailant was either Bustillo or Sirena/Senior Julio—believed the testimony offered by the Commonwealth's witnesses and found Bustillo guilty of first degree murder. On habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury.[44]

Upon a complete review of the entire record and a full consideration of the evidence presented on the issue of materiality, the Court finds that Bustillo failed to demonstrate a reasonable probability that the disclosure and use of either Detective Cline's notes and/or the Mahoney Report would have resulted in a different outcome at trial. Even accepting fully evidence that the victim suffered an open head wound and bled at the moment of impact, there is no evidence of any transfer of the victim's blood to the assailant. As a result, the materiality of the undisclosed evidence is simply absent.

In addition, although Detective Cline's notes and the Mahoney Report, if produced prior to trial, might have provided additional avenues for the defense to explore and perhaps bolster its theory that Sirena was the actual assailant, Bernhard conceded that, notwithstanding the nondisclosure of the police notes and report, the defense was aware of other witnesses with knowledge about Sirena, but made a strategic decision not to call them at trial. More importantly, as previously noted, Detective Cline's notes place Bustillo at the scene, a fact plainly at variance with Bustillo's alibi defense. Simply put, nothing was presented that suggests that the result of the original trial might have

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[44] *See Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974) (a prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction).

been different. Evaluating the case in context with the entire record, including the omitted evidence, the Court does not find that the jury would have entertained a reasonable doubt regarding Bustillo's guilt.

For these reasons, the Petition for Habeas Corpus Relief is denied.

An Order is enclosed.

Very truly yours,

/s/

R. Terrence Ney

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 201879

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON
Respondent.

FINAL ORDER

This matter came before the Court on April 7, 2004 pursuant to Mario Bustillo's ("Bustillo") Petition for Habeas Relief for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence that the Commonwealth failed to disclose to the defense prior to the 1998 murder trial of Bustillo.

For the reasons stated in this Court's opinion letter dated May 4, 2004, which is attached hereto and made a part hereof, the Petition for Habeas Corpus Relief is DENIED.

This Order is FINAL. The Court notes the Petitioner's exceptions to this Order.

ENTERED this 4th day of May, 2004.

/s/
JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. ____

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR APPEAL

INTRODUCTORY STATEMENT

This matter arises from a petition for habeas corpus filed in the Circuit Court for Fairfax County; the principal claim for relief was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The sole issue at Mario Bustillo's first-degree murder trial was *who* struck James Merry with a baseball bat at the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997. At trial, three witnesses said that Bustillo, a Honduran national, committed the crime. Two eyewitnesses testified that Bustillo was not the killer and one identified another Honduran national known as "Sirena"—now known to be Julio Osorto—as the man who struck and killed Merry. The day after Merry died, Sirena left the country for Honduras. Since then, he has confessed to the slaying in a surreptitiously videotaped conversation.

It now turns out that prosecutors failed to disclose police reports that point directly to Sirena as the killer—even though the Commonwealth at trial mocked Bustillo's defense that Sirena swung the fatal blow. The *Brady* information includes the report of an officer who, canvassing the area shortly after the murder, stopped Sirena; observed what appeared to be "ketchup stains" on Sirena's shirt and pants; noted that Sirena gave inconsistent accounts of where he was coming from; and recorded that Sirena denied being at the Popeye's that evening (even though the government's own witnesses placed him there). The Commonwealth also failed to disclose investigator notes containing the statement of an eyewitness who equated "Sirena" with "Julio" and said that he saw Sirena cock a baseball bat as he approached the victim. The Circuit Court found that the suppressed reports were exculpatory and should have been disclosed under *Brady*, but ultimately held that the evidence was not "material." The latter conclusion defies both common sense and established precedent.

The Circuit Court also declined to address a violation of Bustillo's rights under Article 36 of the Vienna Convention on Consular Relations, December 14, 1969, 21 U.S.T. 77. That violation prevented Bustillo from presenting official evidence implicating Sirena as the perpetrator, and the Circuit Court's decision rejecting that claim both misapplies the treaty and creates an unnecessary conflict with recent International Court of Justice decisions.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In 1998, a Fairfax County jury convicted Bustillo of first-degree murder and sentenced him to 30 years in prison. Tr. 3/30/98 at 24. After the Circuit Court denied Bustillo's motions to set aside the verdict, Tr. 7/13/98 at 269; Order of Oct. 7, 1998, the Court of Appeals of Virginia affirmed the conviction, 2000 WL 365930, *3 (Va. App. Apr. 11, 2000). This Court denied the petition for appeal on January 17,

2001 (Record No. 001110), and the Supreme Court of the United States denied the petition for a writ of certiorari, 532 U.S. 1072 (2001).

On January 13, 2002, Bustillo filed a petition for a writ of habeas corpus in the Circuit Court for Fairfax County. On August 8, 2002, the Circuit Court held that Bustillo's Vienna Convention claim was time barred. Nonetheless, the Circuit Court ordered a hearing to determine whether the Commonwealth had improperly withheld two items of exculpatory evidence. Order of Aug. 8, 2002, at 4-5 (as amended by Order of Oct. 2, 2002). After a hearing on December 5, 2002, the court denied the petition.

While that matter was pending, Bustillo filed motions to compel the production of evidence relating to "Sirena" and in the case file generally. The Circuit Court granted the motions in part on October 2, 2002, and November 15, 2002. The prosecution then produced the police report of Officer Christopher Mahoney and, after Bustillo filed a motion for sanctions, the investigative notes of Detective Richard Cline. Officer Mahoney's report revealed for the first time that Mahoney had encountered Sirena in the area of the murder shortly after it occurred, that Sirena had what appeared to be "ketchup" stains on his shirt and pants, that he gave inconsistent statements about where he was coming from, and that he denied having been at the Popeye's restaurant that night. 63 Va. Cir. at 125, 127 n.6; Mahoney, C.J., Fairfax County Police Dep't Supp. Inv. Rep't, Dec. 10, 1997 (22:00 hrs) ("Mahoney Report") at 1. Detective Cline's notes revealed—also for the first time—that an eyewitness had seen Sirena at the crime scene approaching the victim with a "cocked" baseball bat. 63 Cir. Va. at 127 & n.5.

On September 16, 2003, the Circuit Court granted Bustillo's motion for reconsideration, holding that the failure to disclose those reports violated *Brady*. 63 Va. Cir. at 136. After an April 7, 2004, hearing, the Circuit Court concluded that the exculpatory evidence was not material and

denied Bustillo's habeas petition in full. Opinion of May 4, 2004, at 9.

Pursuant to Rule 5:17(a)(1), Bustillo filed a timely notice of appeal from the Circuit Court's final judgment. On July 23, 2004, this Court extended the time to file the petition for appeal to and including September 3, 2004. In the same order, the Court denied a motion to file transcripts of the December 5, 2002, and April 7, 2004, habeas hearings out of time.[1]

STATEMENT OF FACTS

There is no dispute that, as James Merry smoked a cigarette outside the Popeye's restaurant in Springfield, Virginia, on the evening of December 10, 1997, someone struck him in the head with a baseball bat; several days later, Merry died. The sole dispute has always been who swung the bat that killed Merry. The prosecution alleged that Mario Bustillo committed the crime. Bustillo has always insisted that another Honduran national known as "Sirena"—now known to be Julio Osorto—struck and killed Merry. The day after Merry died, Sirena left the United States for Honduras and has since confessed to killing Merry in a surreptitiously videotaped conversation.

This habeas case arises from the prosecution's failure to disclose to the defense the investigatory notes and police reports supporting Bustillo's claim that Sirena, not he, committed the crime. That material includes the report of an officer who, while canvassing the crime scene shortly after the crime, encountered Sirena; observed that he had

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[1] The transcripts of the December 5, 2002, and April 7, 2004, hearings on habeas relief are not necessary to resolve the questions presented by this case. The relevant facts are set forth in the Circuit Court's opinions below, the prior opinions on direct review, and the transcripts of the criminal trial filed with the district court. To the extent the Commonwealth wishes to cite or rely on the transcripts of the December 5, 2002, or April 7, 2004, habeas hearings, however, Bustillo waives any objection to consideration of those transcripts.

red stains (thought to be "ketchup") on his shirt and pants; noted that Sirena gave conflicting statements of where he was coming from; and recorded Sirena's false assertion that he had not been at the Popeye's that evening. The material also includes the statement of a witness who saw Sirena at the Popeye's approaching the victim, "cocked" baseball bat in hand. The case also concerns a violation of Article 36 of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, which prevented Bustillo from presenting additional evidence implicating Sirena, including irrefutable proof of Sirena's flight to Honduras the day after Merry's death. Indeed, once Sirena's travel to and presence in Honduras was verified—which his trial counsel could have done if Bustillo's Vienna Convention rights had been enforced—habeas counsel obtained Sirena's self-authenticating videotaped confession to the murder.

I. The Investigation And Trial

A. Pre-Trial Investigation And Proceedings

The fifteen to twenty youths in and around the Popeye's restaurant scattered when James Merry was attacked. Tr. 3/17/98 at 128, 219, 238. When police arrived on the scene at about 8:30 p.m., they found Merry lying "down on the ground outside" the Popeye's, "bleeding." Tr. 3/17/98 at 116 (Officer Milam); *id.* at 133, 139 (Michelle Gutierrez); *id.* at 223 (Jesse Konstanty). "[T]he evidence also showed that there was blood at the scene, including photographic evidence of what appeared to be" drops of "blood spatter." 63 Va. Cir. at 131 (footnote omitted); Tr. 3/17/98 at 139, 226; Commonwealth Tr. Exh. 1 (photograph).

At about 10:00 p.m. that evening, while canvassing the area around the crime scene, Officer Christopher Mahoney stopped "Julio C. Osorto," now known to be "Sirena." According to Officer Mahoney's report, Sirena "had what appeared to be ketchup" on his shirt and pants. Mahoney

Report at 1. Sirena gave conflicting statements about where he was coming:

> [Mr. Osorto] claimed he had come from McDonald's .... Mr. Osorto originally stated he was coming from his cousin[']s residence on Cumberland Ave., then he stated he was coming from Commerce St. . . . He stated he lived at Chelsea Square Apts. but was confused on the address.

Ibid. When asked whether he had been at Popeye's that evening, Sirena "stated he was not at Popeye[']s." *Id.* at 1-2. According to the report, Sirena's breath smelled of alcohol. *Id.* at 2. Officer Mahoney's report was not disclosed to the defense until four years after trial.

The evening of the murder, officers gathered several witnesses at the police station. Tr. 3/18/98 at 39. Between 3:00 a.m. and 4:00 a.m., Detective Richard Cline showed an array of six photographs to witnesses Michelle Gutierrez and Jesse Konstanty. *Id.* at 39-41, 165-168. The array included Bustillo's photograph, but it did not include a photograph of Sirena or any other person present when the attack occurred. *Id.* at 56. Gutierrez and Konstanty, who had met Bustillo before, identified Bustillo as the assailant. *Id.* at 41. Bustillo was arrested that morning while attending high school. *Id.* at 41, 43, 53, 68. Although Bustillo is a Honduran national, he was not advised of his right under the Vienna Convention to consult with the Honduran Consulate; nor were Honduran officials notified of his arrest.

Around January 7, 1998, Detective Cline interviewed eyewitness Jose Armando Amaya. According to Detective Cline's notes, Jose Amaya saw both Sirena and Bustillo at the Popeye's restaurant that evening. Although he "[d]idn't see the bat hit the head" and "[c]ouldn't tell who actually hit the guy," Jose Amaya said that he "[s]aw Sirena take bat from shirt" and "cock it." Det. Cline Notes from Jan. 7, 1998, Interview with Jose Amaya at 3 ("Det. Cline Notes");

63 Va. at 127 n.5 ("Amaya observed 'Sirena' at the scene with a 'bat cocked.'"). Jose Amaya said that Sirena had lived in the Chelsea Square Apartments, the same apartment identified by Sirena when Officer Mahoney stopped him the night of the murder. Det. Cline Notes at 4. Jose Amaya also stated that Sirena left the area by December 31, 1997. *Ibid.* The Detective's earlier notes likewise indicated that Sirena was at Popeye's around the time of the murder. Det. Cline Notes of N. Parada Interview, Dec. 18, 1997, at 1. Like the Mahoney Report, the Cline notes revealing that Jose Amaya saw Sirena approaching the victim with a cocked bat were not disclosed until 2002.

At a preliminary hearing held on December 29, 1997, Bustillo's trial counsel reminded the prosecution of its obligation under *Brady* to disclose all exculpatory material. Tr. 12/29/97 at 5. More than two months later, about two weeks before trial, the prosecution sent a series of letters purporting to "summarize" the exculpatory information in its possession. The prosecution did not disclose Officer Mahoney's report of his encounter with Julio Osorto (Sirena) while canvassing the area around the crime. It thus did not mention that Mahoney observed red stains that looked like "ketchup" on Sirena's clothing; that Sirena gave inconsistent statements about where he was coming from; and that Sirena (falsely) denied being at the Popeye's that night. In a letter dated March 9, 1998, the Commonwealth did disclose that eyewitness Jose Amaya had "told law enforcement that he saw [Bustillo] and Sirena at the scene and that both had bats," and that Jose Amaya "couldn't tell which one struck the victim." Letter of Mar. 9, 1998, at 2. Unlike Detective Cline's notes, however, the letter did *not* mention that Jose Amaya reported seeing Sirena with his "bat cocked." 63 Va. Cir. at 131 & n.7.

B. The Trial

There was no physical evidence connecting Bustillo to the crime. The prosecution therefore relied on the testi-

mony of three eyewitnesses (Michelle Gutierrez, Jesse Konstanty, and Valeria Landaeta) who claimed that they saw the attack from within the Popeye's restaurant. They admitted that the attack lasted only seconds and that, although the attack occurred outside the restaurant after dark, their observations were made from within the well-lighted restaurant, through a glass window that was partially obstructed by the advertising poster against which Merry was leaning. Tr. 3/17/98 at 127-28, 131, 142, 157, 161, 222, 241-42, 249, 251; Tr. 3/18/98 at 20, 25, 27-28, 30. They also agreed that, after the attack, they had discussed with each other whom they thought the attacker had been. Tr. 3/17/98 at 252-53; Tr. 3/18/98 at 31-32. They ultimately identified Bustillo as the assailant, relying in part on their belief that he was the only one wearing a red shirt. Tr. 3/17/98 at 131, 222; Tr. 3/18/98 at 36. The prosecution also offered the testimony of Detective Cline, who said that no one he interviewed identified anyone other than Bustillo as the attacker. Tr. 3/18/98 at 69.

Bustillo presented the testimony of two eyewitnesses who were standing outside the restaurant, just steps away from Merry, when the attack occurred. Amilcar Amaya testified that he was just leaving the Popeye's when he saw Sirena approach James Merry, take out a baseball bat, and strike Merry in the head. Tr. 3/18/98 at 100-01. Christina Hondoy testified that, shortly before the attack on Merry, she had stepped out of the Popeye's with a friend (Yahayra Queirolo) to smoke a cigarette. Tr. 3/18/98 at 141-42. She had just turned to speak with Merry, who was smoking a cigarette steps away, when she saw someone strike Merry in the head with a baseball bat. *Id.* at 142. She stated unequivocally that, although she did not know the person who assaulted Merry, she knew that it was *not* Bustillo. *Ibid.* Honday further testified that, after a preliminary hearing, she told Detective Cline that the person she saw at the hearing, Mario Bustillo, was not the person who struck

Merry. Tr. 3/18/98 at 143, 191. According to Hondoy, Cline told her "[not to] worry about it," and that she probably would not be needed at trial. *Ibid.*

Ulma Martinez testified that, the day after James Merry died, she saw Sirena on a flight to Honduras. On cross-examination, Martinez admitted she did not know Sirena's last name. Tr. 3/18/98 at 168-69. Two of Bustillo's high school teachers testified that Bustillo's demeanor the day after the assault was inconsistent with that of a murderer. *Id.* at 115-18, 132-35, 142.

In closing argument, the prosecution disparaged Bustillo's defense that Sirena had committed the murder, urging that there was no credible evidence that Sirena, rather than Bustillo, had swung the bat that killed Merry. Tr. 3/19/98 at 18, 23, 76. The prosecutor dismissed Amilcar Amaya as a "gang member," *id.* at 19-20; Christina Hondoy, the prosecutor also argued, had been given loans by the Bustillo family, *id.* at 21-23. The "whole Sirena thing," the prosecutor mocked, was very "convenient" because "Sirena apparently isn't available." *Id.* at 20. Referring to "this so-called Sirena," the prosecution pointed out that neither Amilcar Amaya (who testified that he saw Sirena strike James Merry), nor Ulma Martinez (whom prosecutors characterized as having "supposedly" seen Sirena flee to Honduras the day after Merry's death) actually "kn[e]w his full name." And the prosecutor pointed out that no one had produced "plane tickets . . . for this Sirena." *Id.* at 20-21, 76.

Neither the judge, the jury, nor the defense knew that Jose Amaya had told Detective Cline that he saw "Sirena—Julio" of the Chelsea Park Apartments approach Merry with a "cocked" baseball bat. Nor was anyone but the prosecution aware that Officer Mahoney stopped Sirena of the Chelsea Park Apartments while canvassing the crime scene; that Sirena had red stains on his shirt and pants; that Sirena gave inconsistent statements about where he had been; and that Sirena lied about being at the Popeye's that

evening. And because Bustillo's right to contact the Honduran Consulate was ignored, the jury never saw the picture of Sirena that the Consulate would have provided to the defense; the official records of Sirena's flight the day after Merry's death (corroborating a key defense witness); or the testimony of numerous witnesses who, when later presented with pictures of Sirena, identified him as the assailant.

The jury returned a verdict of guilty and sentenced Bustillo to 30 years' imprisonment. The Virginia Court of Appeals affirmed the conviction. This Court denied the petition for appeal, and the United States Supreme Court denied further review.

II. The Habeas Corpus Action

A. The Petition

Bustillo filed a petition for a writ of habeas corpus in the Circuit Court for Fairfax County based on newly discovered evidence, violations of the duty to disclose exculpatory evidence under *Brady*, and a violation of the Vienna Convention on Consular Relations.

1. *New Evidence and Vienna Convention Claims.* The new evidence consisted of, among other things, a surreptitiously recorded videotape in which Sirena admitted killing Merry. Habeas Pet., Exh. 9, at 3, 4. The confession matched the trial testimony perfectly. With respect to the tremendous force of the blow, Sirena bragged: "When I smashed [Merry] with that blow . . . I heard that son of a bitch sound like a big box." *Id.* at 6. Consistent with the witness testimony, Sirena stated that he attacked Merry while Merry was outside the Popeye's smoking a cigarette. *Id.* at 1, 3-4. Consistent with testimony that the attacker was wearing red, Sirena stated that he was wearing a red sweater. *Id.* at 3, 7. And consistent with Officer Mahoney's (at that point still undisclosed) observation that Sirena's breath smelled of alcohol when he was stopped after the

attack, Sirena stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. *Id.* at 6-7.

The habeas petition included a copy of the videotaped confession and the affidavits of four eyewitnesses who swore that, upon viewing the videotape, they "recognized the individual facing the camera" (Sirena) as the person they saw "committing the December 10, 1997, assault" on Merry. Habeas Pet. Exhs. 11-14. It also included sworn affidavits by several witnesses who, based on a photograph of Sirena belatedly produced by Fairfax County Police Officer Gelabert, identified Sirena as the attacker; several witnesses claimed that they had not come forward earlier because they feared being deported. *Id.* Exhs. 16, 21, 22, 29, 32.

With respect to the Vienna Convention violation, Bustillo executed an affidavit attesting that, if he had been advised of his rights under the Vienna Convention, he would have invoked them. Habeas Pet. Exh. 14B (Aff. of Dec. 13, 2001). The Honduran Consulate averred that, had it been apprised of the case, it would have (at a minimum) confirmed Sirena's nationality, provided official records of his arrival in Honduras just after Merry's death, and provided a picture of Sirena. Letter of Feb. 20, 2002 from Nat'l Comm'r of Human Rights, Republic of Honduras, to Gov. of Virginia; Amicus Brief of the Embassy of Honduras (filed in Circuit Court Apr. 29, 2002). On August 8, 2002, the Circuit Court denied much of Bustillo's habeas petition, including his new evidence and Vienna Convention claims, holding the latter to be time-barred. Opinion of Aug. 8, 2002, at 7 (as amended by Order of Oct. 2, 2002).

2. *The* Brady *Claim.* The habeas petition also alleged that the prosecution had unlawfully withheld exculpatory evidence in violation of *Brady*, *supra*. The Circuit Court ultimately granted a motion to compel production of the investigation files and all information that the Commonwealth had about "Sirena." On October 19, 2002—more than four

years after the trial—the prosecution for the first time disclosed Officer Mahoney's report of his encounter with Sirena while canvassing the crime scene, describing the document as "[a] self-explanatory police report taken shortly after the attack." Letter of October 19, 2002.

The Commonwealth's letter also referred to "the notes of Detective Cline," stating that they "contain scattered references to 'Sirena' as a person present at the scene. A note dated December 18, 1997, contains the following notation: 'Sirena – Julio' as being one of the persons present at the scene." *Ibid.* The Commonwealth's attorneys, however, refused to produce Detective Cline's notes, insisting that "the relevant part of those notes was disclosed . . . during pre-trial discovery by letter dated March 9, 1998." Only after Bustillo filed a motion for sanctions were copies of the actual notes produced. Unlike the prosecution's pre-trial *Brady* "summary," Detective Cline's actual notes indicated that eyewitness Jose Amaya had seen Sirena pull out a bat and "cock[ ] it." See pp. 4, 6, *supra*.

B. The Circuit Court's Determination That The Evidence Is Exculpatory

Based on that evidence, the district court granted reconsideration of its decision denying habeas relief, holding that the prosecution should have disclosed the investigatory reports and notes. Under *Brady*, the Circuit Court explained, "[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 63 Va. Cir. at 128. Because both Officer Mahoney's report and Detective Cline's notes "unquestionably implicate 'Sirena' . . . as a possible suspect," the Circuit Court held that they "must be deemed exculpatory," and should have been disclosed to the defense. *Id.* at 131.

The Circuit Court explained that the prosecution had disclosed evidence in Detective Cline's notes favorable [to] its case, but that it had "failed to disclose that [Jose] Amaya also told Detective Cline that he observed Sirena holding a bat in a 'cocked' position. This latter piece of information not only makes clear that Sirena was present at the scene, but implicates Sirena as the actual assailant." 63 Va. Cir. at 131. The Circuit Court also agreed that the Mahoney Report implicated Sirena: The fact that "an individual named Julio Osorto was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing," the Circuit Court stated, "must be deemed exculpatory." *Id.* at 129. Although the fatal blow to Merry produced a "closed head wound" (*i.e.*, the blow did not break the skin), and no blood was found on the baseball bats recovered near the scene, the Circuit Court concluded that the red stains were relevant because "photographs of the crime scene depict[] what appears to be blood spatter." *Id.* at 131-132 & n.18; *id.* at 129 ("The Commonwealth was certainly aware that Merry's blood was found at the scene."). Because there was "testimony identifying 'Sirena—Julio' as the assailant, . . . the stopping of a 'Julio' near the crime scene at the time of the incident with red stains on his clothes, is exculpatory in nature[,] warranting its production to the defense prior to trial." *Id.* at 132; *see id.* at 135. The Circuit Court ordered a "limited hearing" on materiality. *Id.* at 132.

C. The Ruling On Materiality

At the hearing, and in response to the Circuit Court's apparent concern that blood spatter evidence might be inconsistent with Merry's "closed" head wound, Bustillo presented the testimony of Dr. Bernad, a licensed neurologist. Dr. Bernad testified that such traumatic blows to the head, even if they produce a "closed" wound, can often cause blood to "aerate" (*i.e.*, to spray) "from the ear immediately upon impact." Opinion of May 4, 2004, at 5; *see ibid.* (noting

"Dr. Bernad's testimony that blood would have 'sprayed/aerated' from the victim's ear at some point upon or immediately after impact"). Two eyewitnesses, Yahayra Quieroloa and Amilcar Amaya, testified that they saw blood spray when Merry was struck. *Id.* at 6.

Defense counsel from Bustillo's original trial testified that, because he had argued that Sirena was the actual assailant, he was "'shocked' to learn [of] the existence of Detective Cline's notes and the Mahoney Report." Opinion of May 4, 2004, at 8. He stated that, had he been aware of the Mahoney Report, he likely would have called Officer Mahoney to testify regarding his encounter with Sirena to bolster his contention that Sirena was the assailant. *Id.* at 8 & n.39. Moreover, because of the prosecution's "several references" at trial "to the fact that the defense called only one witness in support of its contention that Sirena, not Bustillo, was the assailant," counsel "testified that this corroboration would have 'enhanced' the defense's position." *Id.* at 8 n.39. *See also id.* at 7 n.38 (noting the difficulty of proving Sirena's existence and "presence at the Popeye's Restaurant the night Merry was attacked").

Following the hearing, the Circuit Court ruled that the suppressed evidence was not material. The Circuit Court stated its belief that, on habeas review, it "cannot consider or evaluate the weight or credibility of evidence presented to the jury" at the original trial. Opinion of May 4, 2004, at 9. The Circuit Court did, however, opine on the weight and credibility of the withheld exculpatory evidence. With respect to the red stains on Sirena's shirt, the court downplayed the expert testimony that blood aerated from Merry's ear on impact because (according to the court) "the crime scene photos revealed no signs of blood 'spray,' 'splatter' or droplets, but rather only a few sizable drops of blood the Court finds consistent with blood seepage, not blood spatter." *Id.* at 5. It belittled Yahayra Quieroloa's testimony that she saw blood coming from Merry's ears, be-

cause she previously had stated that she saw blood explode from his ears, nose, and throat, and because she could not recall how quickly the blood spray appeared after the blow. *Id.* at 6. And the court devalued Amilcar Amaya's testimony "that upon impact, he observed blood spray 'in the direction of' and 'over' Sirena" because Amilcar Amaya did not himself observe blood on Sirena's shirt and did not mention the blood in his trial testimony or post-trial affidavit. *Id.* at 6-7.

Finally, the Circuit Court relied heavily on the testimony of Bustillo's trial counsel. Although Bustillo had accused trial counsel of rendering constitutionally ineffective assistance by failing to present additional defense witnesses, the Circuit Court deemed trial counsel's concession that he was not certain that disclosure of the *Brady* evidence would have altered the trial's outcome to be "instrumental" to its resolution of the case. Opinion of May 4, 2004, at 9.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying Bustillo's petition for habeas corpus on the ground that the unlawfully withheld *Brady* evidence was not material.

2. The Circuit Court erred by attempting to reconcile the belatedly produced exculpatory evidence with a guilty verdict, rather than attempting to assess the possible impact that evidence could have had upon a reasonable juror.

3. The Circuit Court erred by failing to address the impact of Sirena's inconsistent statements to Officer Mahoney on the night of the attack.

4. The Circuit Court erred when it failed to consider the impact of the wrongfully withheld evidence in light of the divided eyewitness testimony presented at trial.

5. The Circuit Court erred in affording "instrumental" significance to the self-serving testimony of trial counsel that he was "uncertain" of the impact that the wrongfully withheld evidence could have had on the jurors at trial.

6. The Circuit Court erred in holding that Bustillo's claim under Article 36 of the Vienna Convention on Consular Relations was procedurally barred.

QUESTIONS PRESENTED

1. Whether wrongfully withheld, exculpatory evidence was material to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), where that evidence showed that the person who the defendant claimed actually committed the murder was stopped and interviewed by police near the crime scene on the night of the attack, with red "ketchup" stains on his shirt and pants; that he gave the officer false and inconsistent statements about where he was coming from and had been; and was seen by a witness at the crime scene approaching the victim with a "cocked" baseball bat; and where the prosecution repeatedly suggested to the jury that the "so-called" alternative suspect was a "convenient" defense contrivance.

2. Whether the Circuit Court applied the wrong *Brady* materiality standard by (a) attempting to reconcile the wrongfully withheld, exculpatory evidence with the guilty verdict, rather than evaluating the impact it could have had upon a reasonable juror in the context of a trial; (b) selectively crediting certain pieces of evidence arguably consistent with the verdict while disregarding other, persuasive evidence to the contrary; (c) failing to assess the impact of improperly suppressed exculpatory evidence in light of the divided eyewitness evidence; and (d) deeming "instrumental" and misreading the self-serving testimony of Bustillo's trial counsel.

3. Whether the Circuit Court properly refused to consider Bustillo's claim under the Vienna Convention on Consular Relations due to an asserted procedural bar.

4. Whether the Commonwealth violated Bustillo's right to contact consular officials under the Vienna Convention, where the omission prevented defense counsel from identi-

fying the alternative suspect for eyewitnesses who later recognized him as the actual assailant; documenting the suspect's flight to Honduras just days after the crime occurred and one day after the victim's death (corroborating the testimony of a key defense witness); and obtaining the suspect's surreptitiously videotaped, self-authenticating confession to the crime.

ARGUMENT

In the Circuit Court, while still clinging to the notion that it had not improperly withheld *Brady* material, the Commonwealth's attorneys characterized Bustillo's habeas petition as "conjur[ing] a nightmarish scenario . . . worthy of a novel by George Orwell." Regrettably, it is now apparent that such a "nightmarish scenario" did occur. Critical evidence that would have supported Bustillo's innocence, corroborated crucial defense witnesses, and eviscerated the prosecution's repeated suggestions to the jury that the alternative assailant (Sirena) was a convenient defense contrivance, was wrongfully withheld for more than four years.

The sole issue before the jury at Mario Bustillo's murder trial was whether Bustillo struck the victim with a baseball bat, as the prosecution urged, or whether someone known as "Sirena" did. It now turns out that the prosecution withheld from the defense a police report indicating that a police officer, while canvassing the murder scene shortly after the crime, stopped the individual now known to be Sirena; observed "what appeared to be ketchup" on his pants and shirt; noted that Sirena gave inconsistent accounts of where he was coming from; and recorded Sirena's false statement that he had not been at the Popeye's that evening (even though the prosecution's own witnesses placed him there). The prosecution likewise failed to disclose the notes of a detective indicating that an eyewitness to the murder not only saw Sirena at the

murder scene with a baseball bat, but also saw Sirena "cock" his bat just before the victim was struck.

As the Circuit Court found, there can be no doubt that the withheld evidence is exculpatory. It directly supports Bustillo's theory that Sirena, and not he, swung the bat. The Circuit Court's later conclusion that the suppressed evidence was not "material" is not only counter-intuitive but also the result of clear legal error. Contrary to the directions of this Court and the United States Supreme Court, the Circuit Court attempted to *reconcile* the suppressed evidence with the verdict, rather than *evaluate* the impact it would have had upon reasonable jurors. Moreover, the Circuit Court refused to determine materiality in light of the strength of the evidence at the original trial. Again contrary to this Court's precedents, the Circuit Court failed to account for possible changes in trial strategy that would have occurred absent the *Brady* violation. At bottom, the Circuit Court effectively displaced the standard of materiality under *Brady*—whether there was a reasonable probability that the suppressed evidence would have raised a reasonable doubt *in the mind of a juror*—with an effort to draw inferences in favor of guilt while rejecting compelling inferences consistent with Bustillo's innocence.

Finally, the Circuit Court erroneously refused to consider Bustillo's claim under Article 36 of the Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, even though the violation produced material prejudice. The Consulate of Honduras has represented that, if Bustillo had been advised of his rights and the Consulate notified of his arrest (as required by the Treaty), it would have been able to confirm Sirena's existence; prove through official records that Sirena fled the United States and entered Honduras the day after the victim died; and provided a photograph of Sirena to permit his identification as the culprit (as many witnesses did when presented with a photograph of Sirena after trial). Moreover, once Sirena was located in Hon-

duras, Bustillo's counsel was able to obtain Sireña's self-authenticating, videotaped confession to the crime. The Circuit Court's reliance on a time-bar is inconsistent with a binding treaty obligation and places Virginia law in conflict with recent judgments of the International Court of Justice, an international body entitled to deference on matters of treaty interpretation.

I. The Circuit Court Wrongly Concluded That The Exculpatory Evidence Was Not Material Under *Brady*

Under *Brady v. Maryland*, the government's suppression of "evidence favorable to an accused upon request violates due process where the evidence is material either to *guilt* or to *punishment*, irrespective of the good faith or bad faith of the prosecution." *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E. 2d. 514, 517 (1998) (quoting *Brady*, 373 U.S. at 87) (emphasis added). It is undisputed that the evidence at issue here was "exculpatory" within the meaning of *Soering* and *Brady*. Consequently, the conviction must be reversed if the evidence was "material." *Ibid*; *Frontilla v. Commonwealth*, 38 Va. App. 220, 226, 562 S.E.2d 706, 709 (2002).

Evidence is material if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Soering*, 255 Va. at 464, 499 S.E. 2d at 517 (quoting *United States v. Bagley*, 473 U.S. 667 (1985)). That standard is lower than a showing of "more likely than not." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Moreover, because a criminal defendant may be convicted only by proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 361 (1970), suppressed evidence is material if "there is a reasonable probability that," absent its suppression, "the factfinder would have had a *reasonable doubt* respecting guilt." *Strickland*, 466 U.S. at 695; *Kyles*, 514 U.S.

at 434. Consequently, the question here is whether there is a "reasonable probability" that a single juror would have found a reasonable doubt as to whether Bustillo or Sirena swung the fatal blow. Contrary to the decision below, the answer is unquestionably "yes."

A. The Suppressed Evidence—That The Alternative Suspect Was Seen Approaching The Victim With A "Cocked" Baseball Bat And Was Found By Police Shortly Thereafter Near The Crime Scene, With Red Stains On His Clothes, Offering Inconsistent Statements, And Lying About Having Been At The Crime Scene Earlier—Was Material

The *Brady* evidence at issue here raises far more than a *reasonable probability* that, had prosecutors fulfilled their duty to produce exculpatory evidence, at least one juror would have had a reasonable doubt as to Bustillo's guilt. Bustillo's defense, after all, was that Sirena swung the bat. The wrongfully withheld notes of Detective Cline state that an eyewitness saw Sirena—also a Honduran national—cock a baseball bat as he approached the victim at the Popeye's. And the wrongfully withheld Mahoney Report documents a police encounter with Sirena near the crime scene shortly after the attack. That report reveals that Sirena had "what appeared to be ketchup" stains on his clothing, gave conflicting statements about where he was coming from, and falsely denied having been at the crime scene. Such evidence cannot credibly be dismissed as immaterial to the defense.

1. *The Evidence Is Compelling Proof Of Misidentification*

Particularly where a case turns on eyewitness testimony alone, evidence supporting a claim of misidentification is often critical. For that reason, this Court and others repeatedly have found the failure to disclose evidence sup-

porting such a claim to be material—whether the evidence shows inconsistencies in descriptions, or places alternative suspects with similar physical characteristics at the scene—even where that evidence is far less compelling than the evidence here. *See, e.g., Bowman v. Commonwealth*, 248 Va. 130, 445 S.E.2d 110 (1994); *Davis v. Commonwealth*, 25 Va. App. 588, 491 S.E.2d 288 (1997).

In *Bowman*, for example, prosecutors failed to produce a police report containing a partially inaccurate physical description of the defendant, which corroborated the defendant's claim that police had mistakenly identified him as the perpetrator. 248 Va. at 132, 445 S.E.2d at 112. This Court reversed the conviction, concluding that, even though most of the report's contents were revealed in direct testimony, the report itself was both exculpatory and material to the defense because its suppression prevented the defendant from fully pursuing his defense that the officer mistakenly identified him. "[H]ad [the defendant] been aware of the discrepancy between [the officer's] report and [the defendant's] actual size, and [the report's] failure to mention [the defendant's] facial scars as identifying features in the report," the Court explained, the defendant "reasonably may have taken different and potentially significant actions which could have strengthened [the misidentification] defense." *Id.* at 134-35, 445 S.E.2d at 112.

Here, the prosecutors' failure to turn over the Mahoney Report and Detective Cline's notes likewise prevented the defense from conclusively establishing the presence of Sirena—a Honduran national sharing Bustillo's basic description[2] —at the crime scene. And, as in *Bowman*, the

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[2] The Mahoney Report describes Sirena as between five feet, six inches and five feet, eight inches tall, weighing between 160 and 180 pounds. Mahoney Report at 1. Detective Cline testified at trial that a witness described Bustillo as 'in the neighborhood of five-seven to five-eight, stocky build." Tr. 3/18/98 at 58.

prosecutors' error prevented Bustillo's trial counsel from calling additional witnesses (including Officer Mahoney) to testify in furtherance of the misidentification defense. Opinion of May 4, 2002, at 8 & n.39. Indeed, the evidence here went far beyond mere physical attributes of people present. It would have established that a witness saw Sirena approaching the victim with a "cocked" bat in hand, and that the police encountered Sirena nearby a short time later, with red stains on his clothing, unable to provide a consistent account of where he was coming from. The Circuit Court's conclusion here is irreconcilable with this Court's more realistic view of materiality in *Bowman*.

Nor can the decision below be squared with *Davis*. There, the defendant challenged her identification as the perpetrator but prosecutors refused to turn over information regarding the presence of women of the same race in the same area on the day of the crime. Upholding the defendant's *Brady* challenge, the Court of Appeals concluded that "[t]he existence of evidence that other African-American females were seen in the vicinity of 2100 Main Street that same day might have a tendency to prove [the defendant's] defense that she was not the person [the officer] observed selling drugs . . . ." 25 Va. App. at 598, 491 S.E.2d at 293. The Court of Appeals also required the police to turn over information regarding other women who had been arrested on or near that block the same day for selling drugs. "The identity of women who were later arrested for selling drugs from that locale was material . . . because it tended to support [the] defense of misidentification." *Id.* at 598-99, 491 S.E.2d at 293 (citing *Bowman*, *supra*). Similarly, prosecutors here failed to turn over information documenting a police encounter with another Honduran national with *red stains* on his shirt *and* pants, proximate in time and place to a bludgeoning murder. If the generic physical information sought in *Davis* was material, surely the far more detailed and highly exculpatory

information withheld here is as well. *See also Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 810-11, 829-30 (10th Cir. 1995) (undisclosed report establishing that police found alternative suspect near crime scene with blood-stained clothing material under *Brady*).

2. *Sirena's False And Inconsistent Statements To Officer Mahoney Are Probative Evidence Of His Having Perpetrated The Attack*

The Mahoney Report also records that Sirena, in his short encounter with police, gave inconsistent statements about where he was coming from. Sirena "claimed he had come from McDonald's," but "originally stated he was coming from his cousin[']s residence on Cumberland Ave[nue], [and] then he stated he was coming from Commerce St[reet]." Mahoney Report at 1. This Court and others have often observed that "much weight is given to contradictory statements of material facts," *Toler v. Commonwealth*, 188 Va. 774, 781, 51 S.E.2d 210, 213 (1949), since "inconsistencies and contradictions" can "support an inference of guilty knowledge," "elevat[ing] suspicion to the level of probability," *Hyde v. Commonwealth*, 217 Va. 950, 975, 234 S.E.2d 74, 77-78 (1977). "A jury may properly consider . . . contradictory or inconsistent statements to the police as circumstantial evidence demonstrative of a guilty state of mind." *Ortega v. Commonwealth*, 1996 WL 31998, at *2 (Va. App. Jan. 30, 1996) (citing *Black v. Commonwealth*, 222 Va. 838, 842, 284 S.E.2d 608, 610 (1981)). Inconsistent statements are often "the strongest evidence of a criminal defendant's guilty knowledge"; they are so "inherently suspicious" that a "factfinder could reasonably conclude that they mask an underlying consciousness of guilt." *United States v. Diaz-Carreon*, 915 F.2d 951, 955 (5th Cir. 1990).

The Mahoney Report also memorializes a clear lie—Sirena's claim that "he was not at the Popeye[']s" that evening. Mahoney Report at 1-2. The prosecution's own

witnesses, however, placed Sirena at the Popeye's that night. Tr. 3/17/98 at 129, 263, 271. (Jose Amaya's suppressed statement to Detective Cline, moreover, placed Sirena there with a cocked baseball bat in hand. *See* pp. 4, 6, *supra*.) Sirena's false denial is, like his inconsistent statements, evidence "that he [was] trying to conceal his guilt." *Black*, 222 Va. at 841-842, 284 S.E.2d at 610; *Toler*, 188 Va. at 782, 51 S.E.2d at 214 ("untrue account of his whereabouts"); *United States v. Johnson*, 64 F.3d 1120, 1128 (8th Cir. 1995). Finally, the report suggests that Sirena's encounter with the police (after hiding out in a field) may have so unnerved him that he "was confused" about his *own address*. Mahoney Report at 2. That Sirena was so disturbed also evidences his guilt, *United States v. Burgos*, 94 F.3d 849, 872 (4th Cir. 1996), and starkly contrasts to Bustillo's demeanor in school the day after the attack. *See* Tr. 3/18/98 at 118-119, 133-134.

3. *Detective Cline's Notes Provide Crucial Corroboration Of Bustillo's Defense And Sirena's Guilt*

The undisclosed notes of Detective Cline make the prejudice to Bustillo all the more obvious. Those notes "equat[ed] Julio and Sirena" and "indicat[ed] that Sirena held a 'cock[ed] bat'" just before Merry was struck. Opinion of May 4, 2004, at 3. They thus placed Sirena at the murder scene, *Davis*, 25 Va. App. at 598-99, 491 S.E.2d at 293, in direct conflict with what Sirena told Officer Mahoney. Moreover, they placed him there coming at the victim Merry with a "cocked" baseball bat in hand. Taken together with the eyewitness who identified Sirena as the perpetrator at Bustillo's trial, that evidence certainly would have been sufficient to indict and perhaps convict Sirena as the perpetrator. Indeed, like the defendant whose conviction this Court upheld in *Toler*, Sirena's presence at the crime scene (with a cocked bat), his "failure to give a satisfactory explanation therefore, his untrue account of his whereabouts, and his contradictory statements"—not to

mention the red stains on his shirt and pants—"furnish bases for reasonable inferences that his explanations were made falsely in an effort to conceal his guilt. . . . In other words, the facts established are consistent with his guilt and inconsistent with his innocence." 188 Va. at 782, 51 S.E.2d at 214. Since the evidence would have been sufficient to charge and maybe even *convict* Sirena as the perpetrator, *a fortiori* it raises a *reasonable probability* that a jury might have entertained a *reasonable doubt* about Bustillo's guilt.

4. *The Suppressed Evidence Could Have Dramatically Altered The Defense's And Prosecution's Trial Strategies*

The suppressed evidence, moreover, could have entirely altered the strategy of defense and prosecution alike at trial. Capitalizing on the defense's "difficulty finding evidence to corroborate the existence of an individual named 'Sirena,'" Opinion of May 4, 2004, at 7 n.38, the prosecution made Sirena out to be a phantom. In closing arguments, the prosecutor referred to him as "this so-called Sirena"; observed that no one seemed even to know his last name; and repeatedly called him and his unavailability "convenient." Tr. 3/19/98 at 20, 76. Officer Mahoney's report, however, would have turned the "so-called Sirena" into a real person with a first and last name—Julio Osorto—and placed him near the scene of the crime, with red stains on his clothes, giving inconsistent statements, and falsely denying having been at the Popeye's.

Moreover, disclosure would have led to additional compelling evidence for use at trial. For example, when habeas counsel learned of Sirena's real name, he was able to obtain a picture of Sirena. That picture allowed witness after witness unequivocally to identify him as the actual assailant. Surely that could have tipped the balance in favor of reasonable doubt in the mind of at least one juror. Counsel also would have been able to prove Sirena's flight the day after Merry died. See pp. 33-34, *infra*. Further, once he was

armed with Sirena's real name, habeas counsel was able to obtain a surreptitiously recorded videotape of Sirena confessing with self-authenticating detail. The confession did not merely match other trial testimony. *See* p. 10, *supra*. It corresponded with then still-undisclosed details in the Mahoney Report: Consistent with that Report's observation that Sirena's breath smelled of alcohol when he was stopped after the attack, for example, Sirena stated in his confession that, after striking Merry, he hid out in a field and drank a six-pack of beer. Compare Mahoney Report at 2 with Habeas Pet., Exh. 9, at 6-7. More powerful evidence of Sirena's guilt—and Bustillo's innocence—is difficult to imagine.

The jury's verdict and 30-year sentence, moreover, were both based on the belief that Bustillo swung the fatal blow that killed Merry. Had Bustillo been provided the evidence supporting Sirena's involvement, Bustillo might have conceded his presence at the Popeye's on the night in question but identified Sirena as the attacker—a strategy that was not realistically open to Bustillo without additional evidence of Sirena's existence and whereabouts.

5. *In The Context Of A Trial Rife With Conflicting Eyewitness Testimony, The Cumulative Effect Of The Additional Exculpatory Evidence Is Overwhelming*

Once the suppressed evidence is "evaluated in the context of the entire record," including the testimony at trial, the prejudice becomes inescapable. *Kyles*, 514 U.S. at 461 (quoting *Agurs*, 427 U.S. at 112); *see Lovitt v. Warden*, 266 Va. 216, 245, 585 S.E.2d 801, 818 (2003) ("[T]he determination whether undisclosed exculpatory evidence was material must be made by considering its cumulative effect."); *Soering*, 255 Va. at 464, 499 S.E.2d at 517. This was a hotly-contested case. No physical evidence connected Bustillo to the murder, and the jurors were confronted with sharply conflicting eyewitness accounts. The Common-

wealth's three eyewitnesses identified Bustillo as the assailant. But they purported to observe the attack—which occurred outside the Popeye's restaurant after dark—from a table inside that well-lighted establishment. The window, moreover, was partially obstructed by a poster. *See* Tr. 3/17/98 at 157, 158; p. 7, *supra*. In contrast, two other eyewitnesses testified that Bustillo was *not* the assailant. And they observed the attack from outside the restaurant, just steps away from the victim. Tr. 3/18/98 at 98-101, 141-142.

There were also weaknesses in the testimony of the Commonwealth's witness. Valeria Landaeta admitted that the attack lasted just seconds and that she saw it as a "flash" out "of the corner of [her] eye" as she was eating, Tr. 3/18/98 at 27; she acknowledged that she had identified Bustillo in part based on clothing color, *id.* at 28, 30. Witness Jesse Konstanty, a convicted felon, fingered Bustillo, but his testimony was substantially impeached.[3] And Michelle Gutierrez (Konstanty's girlfriend) also relied on clothing color for identification. Tr. 3/17/98 at 133, 170. All three witnesses, moreover, discussed with each other whom they thought they saw after the attack, raising the possibility that one's false recollection (particularly as to who was wearing what color before the attack) tainted the recollection and testimony of the others. *See also* p. 10, *supra* (Sirena's confession that he was wearing red). In the context of those sharply conflicting accounts and evenly divided testimony, the suppressed evidence—which places Sirena next to the victim with a cocked bat, and then near the crime scene with red stains on his shirt and pants, giving contradictory accounts of where he had been, and

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[3] Konstanty testified, for example, that he chased and fought Bustillo, punching Bustillo in the face. Tr. 3/17/98 at 222-23. There was unchallenged testimony, however, that Bustillo the next day showed no signs of having been involved in the scuffle. Tr. 3/18/98 at 118-19, 133-34.

lying about whether he had been at the Popeye's at all—is simply devastating.

B. The Circuit Court Misunderstood The Proper Standard For Evaluating Materiality Under *Brady*

In reaching the opposite result, the Circuit Court disregarded the standards established by this Court and the United States Supreme Court in three different ways.

1. The Circuit Court's first and most fundamental legal error was its attempt to reconcile all the evidence with a finding of guilt, rather than inquiring whether there is a "reasonable probability" that a single juror would have found a reasonable doubt as to whether Bustillo swung the fatal blow. A court reviewing the impact of improperly withheld *Brady* evidence must put itself in the shoes of the jurors who would have seen, heard, and *weighed* both the trial evidence and the additional exculpatory evidence (plus any resulting changes in strategy, cross-examination, etc.). But here the Circuit Court was concerned only with whether there was a way to square the jury's verdict with some of the newly discovered evidence, and, in so doing, simply discarded certain pieces of evidence in favor of others. Thus, although the *Brady* inquiry focuses on what *the jury (or, more accurately, at least one juror) might have believed*, the Circuit Court's analysis supplanted the jury's evaluative function with the judge's personal appraisal of whether the exculpatory evidence is somehow explainable.

For example, consider the Circuit Court's treatment of the blood at the crime scene, which was made highly relevant by the revelation that Sirena had red stains (thought by the officer to be ketchup) on his clothing during his encounter with Officer Mahoney on the night of the attack. Dr. Peter Bernad, "a neurologist who reviewed [the victim's] autopsy report and treatment records" before testifying at the April 2004 hearing on materiality, opined

that "blood would have 'sprayed/aerated' from the victim's ear at some point upon or almost immediately after impact." Opinion of May 4, 2004, at 5. Dr. Bernad also testified that "the blood would have had 'significant velocity' to . . . exit the ear." *Ibid.* At least three witnesses testified that the injury caused the victim to bleed at the scene, Tr. 3/17/98 at 133; Opinion of May 4, 2004, at 6, and the Circuit Court acknowledged there were "a few sizable drops of blood" in crime scene photos. *Id.* at 5. Even the Commonwealth's own witness, medical examiner Dr. Frances Field, testified at trial "that bleeding from the ear after being struck would not be unusual with the victim's type of injury." *Id.* at 5 n.26. But the Circuit Court set all this aside, stating that in its view the blood most likely "seeped" rather than "spattered" from the victim upon impact. Ironically, the Circuit Court dismissed Dr. Bernad's testimony that "blood may have aerated from the ear immediately upon impact" in large part because "he was not an expert on blood spatter." *Id.* at 5. Yet the Circuit Court apparently believed *it* had sufficient expertise to deem the "sizeable drops of blood" on the ground more consistent with "blood seepage" than "blood spatter," *id.* at 5, and to conclude that the suspicious red stains on Sirena's clothing would not have made a difference to one or more jurors.

In order to conclude that the Sirena police encounter was not material to the defense, the Circuit Court was forced to argue that no adverse inference should be drawn from the presence, just hours after the crime, of red stains on the clothing of an individual whom the government's own witnesses placed at the crime scene. Indeed, one could readily imagine the Commonwealth urging precisely the opposite in a trial of *Sirena*. Ultimately, the Circuit Court's conclusion rests on the incredible premise that red stains on the clothing of the person whom the defendant claims just

killed a man with a baseball bat is not important evidence.[1] The Circuit Court's labored effort to *explain away* the blood evidence, rather than to evaluate how a reasonable juror might have viewed it, is inconsistent with the legal duty under *Brady* to evaluate (not eliminate) the jury's possible deliberative processes.

The Circuit Court's analysis, moreover, entirely ignores perhaps the most damning aspects of the encounter—the facts that Sirena gave inconsistent stories about where he had been, lied about having been at the Popeye's, and was so shaken by his encounter with the police that he could not come up with his own address—all of which compellingly point to Sirena rather than Bustillo as the perpetrator. Given that evidence, it seems unlikely that the red stains were caused by a wayward hamburger that managed to assault both Sirena's shirt and pants. The direct and logical explanation is that Sirena was culpable—and that he lied to the police to avoid suspicion. As this Court has held, inconsistent statements like Sirena's are evidence "that he [was] trying to conceal his guilt." *Black*, 222 Va. at 841-842, 284 S.E.2d at 610; *Toler*, 188 Va. at 782, 51 S.E.2d at 214 ("untrue account of his whereabouts" raises "inferences of guilt"). But the Circuit Court's opinion is devoid of discus-

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[1] The Circuit Court even went so far as to suggest that the apparently low volume of blood at the crime scene and one witness's recollection that he did not see blood on Sirena's *shirt* undermined the materiality of the exculpatory evidence. May 4, 2004, Opinion at 5. To the contrary, those facts are entirely consistent with both the notion that whatever volume of blood exited the victim wound up on Sirena's person, and with Officer Mahoney's observation that most of the "ketchup" was on Sirena's *pants*. In any event, the materiality inquiry should not turn on whether or how much blood "seeped" or "spattered," because the Commonwealth's failure to turn over this exculpatory evidence prevented the defense from investigating that facet of the case and arguing it to the jury. Ultimately, it should have been up to the jurors to determine whether the blood evidence linked Sirena to the crime.

sion of those facts, in patent disregard of the duty to consider how *all* the evidence would have impacted the *jury*. *See Kyles*, 514 U.S. at 440-41 (criticizing court of appeals' *Brady* inquiry for "dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone").

2. The Circuit Court's second legal error was its failure to assess materiality in light of the divided eyewitness evidence at trial. Time and again this Court and the United States Supreme Court have emphasized that materiality must be determined in light of the weight and quality of the evidence presented to the jury at trial. In *United States v. Agurs*, for example, the court noted that, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 U.S. at 113; *see also Payne v. Commonwealth*, 220 Va. 601, 260 S.E.2d 247 (1979); *Brown v. Borg*, 951 F.2d 1011, 1017 (9th Cir. 1991); *Walker v. Lockhart*, 763 F.2d 942, 957 (8th Cir. 1985); *United States v. Herberman*, 583 F.2d 222, 228 (5th Cir. 1978). Consequently, where there is no physical evidence, no confession, and the critical eyewitness testimony is divided, even evidence that is not particularly weighty will be sufficient. That settled proposition notwithstanding, the Circuit Court here expressly refused to consider the weight of the evidence at trial, invoking the mantra that, "[o]n habeas review, the Court cannot consider or evaluate the weight or credibility of the evidence presented to the jury." Opinion of May 4, 2004, at 9. With respect to *Brady* claims, however, precisely the opposite is true; the weight and credibility of the evidence before the jury is critical to materiality.

Moreover, the Circuit Court erred in asserting that the jurors could not acquit without "disregard[ing]" the eyewitness testimony of Michelle Gutierrez, Valeria Landaeta, and Jesse Konstanty, who claimed to have observed the evening attack from within the brightly-lighted Popeye's

dining room, partially obstructed by an advertising poster. Opinion of May 4, 2004, at 7 n.37. The jurors only would have needed a reasonable doubt as to whether that testimony (rather than that of the two other witnesses, who observed the attack from outside the restaurant, steps away from the victim) was mistaken. Ironically, moreover, the Circuit Court had no qualms about supplanting the jury's function when rejecting the testimony of Bustillo's witnesses. Opinion of May 4, 2004, at 6 (failing to find Quierola's testimony "persuasive[,] much less dispositive on any issue of materiality"); *id.* at 6-7 (rejecting Amaya's post-trial testimony in light of trial testimony that it considered "substantial" despite a purported refusal to weigh trial witness credibility). Under the proper legal framework, the court should not have been concerned with whether any witness's testimony was dispositive, but rather with whether the suppressed evidence was cumulatively sufficient—in a case with no physical evidence and divided eyewitness testimony—to meet the low threshold of establishing a "reasonable probability" of reasonable doubt in the mind of even a single juror. *Strickler v. Green*, 527 U.S. 263, 290 (1999); *Kyles*, 514 U.S. at 435.

3. The Circuit Court's third legal error was its decision to deem the testimony of Bustillo's trial counsel, David Bernhard, "instrumental" to the materiality analysis. After noting Bernhard's testimony that he was unsure whether the Mahoney report or Detective Cline's notes would have altered the outcome of trial, the Circuit Court applauded Bernhard's "commendable candor" and "the respect he enjoys from the Court," stating that these two factors, along with Bernhard's testimony itself, were "instrumental in addressing the fundamental issue presented." Opinion of May 4, 2004, at 9. That was error. The question here is the possible effect of the exculpatory evidence on the *jurors* given the evidence at trial—a function to be performed by the judge, not counsel. Indeed, Bustillo's habeas petition

included a claim of ineffective assistance against Bernhard, and Bustillo's leading argument on this point was that Bernhard failed to present sufficient exculpatory witnesses at trial. Habeas Pet. at 53. It is for this transparent reason that Bernhard testified, in the portion of the habeas transcript that the court found "instrumental," that he "made a 'strategic decision' not to call [several exculpatory witnesses] to testify." Opinion of May 4, 2004, at 8-9. Reliance on that sort of testimony rather than an objective evaluation of the evidence is inconsistent with *Brady*. *See Miller v. Angliker*, 848 F.2d 1312, 1321, 1323 (2d Cir. 1988) (noting that, where counsel is accused of ineffectiveness, it is error to rely on defense counsel's stated belief that the *Brady* evidence would not have changed the outcome instead of making "an objective evaluation of the likely impact that the withheld information would have had on typically competent counsel").

In any event, the Circuit Court misread Bernhard's testimony to answer the materiality question. Bernhard stated only that he was "not certain" what the result would have been. *Id.* at 8. To conclude that his testimony precludes a finding of materiality once again eschews the reasonable-probability standard, which permits a finding of materiality even in the face of significant doubt—let alone mere uncertainty—about whether the outcome of trial would have been different. *See, e.g., United States v. Bowie*, 198 F.3d 905, 908-09 (D.C. Cir. 1999) (explaining that the reasonable-probability test is anywhere between a 1% and 50% chance that the jury's verdict would have been different). If the court had engaged in the required analysis, it could not have found Bernhard's uncertainty to be "instrumental" to the *Brady* materiality issue.

II. The "Procedural Default" Rule Did Not Bar Consideration Of Bustillo's Vienna Convention Claim

The Vienna Convention on Consular Relations, Dec. 14, 1969, 21 U.S.T. 77, guarantees that "consular officers shall be free to communicate with nationals of [their] State and to have access to them." *Id.* at Art. 36(2). When "a national of that State [is] arrested or committed to prison or to custody pending trial," authorities are required to advise "the consular post" of the arrested foreign national, and to "inform the person [arrested] without delay of his rights" under the Treaty. *Ibid.* There is no dispute that, in failing to inform Bustillo of his right to consult with consular officials (or to advise the Honduran Consulate of the arrest), the police violated Bustillo's rights under the Vienna Convention. That violation caused substantial prejudice, and the Circuit Court's failure to consider it is inconsistent with recent international precedent.[5]

A. International Precedent Prohibits "Procedural Default" From Blocking Judicial Consideration Of Article 36 Of The Vienna Convention

Because the United States is a signatory to the Vienna Convention, that Treaty is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the con-

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[5] Although Bustillo's attorney at trial was aware of his client's rights under the Vienna Convention, he chose neither to inform his client nor to raise the issue at trial. That failure to notify his client of his known rights by itself "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. It is akin to a defense counsel who knows that his client has a right to a jury trial, but unilaterally decides upon a bench trial. It is not within counsel's authority to summarily waive the right in that case, and likewise it is not within counsel's authority here. That deficiency, and the prejudice shown in Part II(B) below, satisfy both prongs of the test for a claim of ineffective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

trary notwithstanding." U.S. Const. Art. VI, ¶ 2; *see United States v. Belmont*, 301 U.S. 324, 331-32 (1937). The International Court of Justice (ICJ) recently ruled in the *LaGrand* Case (*F.R.G. v. U.S.*) that the practice of barring Vienna Convention claims through the procedural default rule contravenes the terms of the Treaty. 2001 I.C.J. 104 (Judgment of June 28) (hereinafter *LaGrand*). The ICJ there held that "the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violated paragraph 2 of Article 36." *Id.* at ¶ 91. Following *LaGrand*, the ICJ reiterated that the Vienna Convention obligates signatories to consider violations through judicial processes notwithstanding asserted procedural bars. *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 128 (Judgment of March 31) (hereinafter *Avena*). The Vienna Convention, the ICJ declared, imposes an "obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." *Avena*, 2004 I.C.J. at ¶ 121.

The Circuit Court's holding that Bustillo procedurally defaulted his Vienna Convention claims is inconsistent with the Supremacy Clause and those decisions. Notably, both *LaGrand* and *Avena* were handed down several years after *Breard v. Greene*, 523 U.S. 371 (1998), the last case in which the United States Supreme Court discussed a Vienna Convention claim at any length. *Breard* states that courts "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Id.* at 375. The Circuit Court should have heeded that call.

B. The Vienna Convention Violation Resulted In Palpable Prejudice

The Vienna Convention violation prejudiced Bustillo's defense dramatically. Bustillo has attested that he did not know of his rights under the Convention and that he would have exercised those rights had he been advised properly. Habeas Pet. Exh. 14B (Aff. of Dec. 13, 2001). Here, exercise of those rights would have provided Bustillo with crucial information about Sirena, whom Bustillo has identified as the actual assailant. The Honduran Consulate has averred that it would have produced records of the Honduran National Register of Persons, including Sirena's fingerprints and photograph. Habeas Pet. Exh. 26b. Once presented with a photograph after trial, numerous witnesses identified Sirena as the assailant. *See, e.g.*, Habeas Pet., Exhs. 28, 33; p. 10, *supra*.

The Honduran Consulate, moreover, would have verified that Sirena entered Honduras on a flight the day after Merry died. Sirena's flight from the United States on the day after Merry's death is by itself powerful evidence, for the guilty "flee when no man pursueth." *California v. Hodari D.*, 499 U.S. 621, 624 n.1 (1991) (quoting Proverbs 28:1); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). It also would have directly foreclosed the very arguments the prosecution made at trial, including the suggestion that Sirena was a fiction, and its impeachment of Ulma Martinez, who saw Sirena on a flight to Honduras the day after Merry died. *See* Tr. 3/19/98, at 20-21. The prosecution claimed Martinez's testimony was not credible because "[s]he still doesn't know his full name"; noted that "[t]he plane tickets you have are for that witness, not for this Sirena"; and cast doubt as to whether the "so-called Sirena" "was on the plane" at all. *Id.* at 20-21. Yet Sirena *was* on that flight,

and the Government of Honduras *would have proved it* with incontrovertible immigration records.[6]

CONCLUSION

At the petition stage, it cannot be said that the Circuit Court's ruling below was plainly correct. It is, at the very least, reasonably probable that the exculpatory evidence improperly withheld in this case would have led one or more reasonable jurors to find reasonable doubt as to whether Bustillo or Sirena swung the fatal blow. The Circuit Court's resolution of the Vienna Convention issue, moreover, was erroneous. For the foregoing reasons, the petition for appeal should be granted.

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[6] That fact distinguishes this case from any of the Vienna Convention claims heard by this Court. *Bell v. Commonwealth*, 264 Va. 172, 188, 563 S.E.2d 695 (2002), for example, held that harmless error analysis applies and that no suppression remedy is available. In *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (1998), the defendant was arrested in the foreign country and was turned over to officials in that country before being brought to the United States. That case, moreover, also concerned an effort to suppress statements. In any event, neither case addresses the ICJ's recent *Avena* decision, which holds that courts must take cognizance of Article 36 violations where non-speculative prejudice is shown.

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 04-2023

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO DISMISS APPEAL

Petitioner Mario Bustillo respectfully submits the following reply in opposition to Respondent's Conditionally Amended Motion to Dismiss the above-captioned appeal.

INTRODUCTION

This case arises out of the prosecution's failure to produce two pieces of exculpatory evidence supporting petitioner's defense at his first-degree murder trial, as well as a violation of his rights under the Vienna Convention on Consular Relations. Although petitioner's sole defense at trial was that another Honduran national, Sirena, swung the baseball bat that killed James Merry, prosecutors failed to disclose a police report revealing that an officer, while canvassing the area around the crime scene shortly after the attack, actually stopped the individual, Julio Osorto, now known to be "Sirena"; that the officer observed red

"ketchup" stains on Sirena's shirt and pants; that Sirena gave inconsistent accounts regarding his whereabouts; and that Sirena lied (according to the prosecution's own witnesses) about being at the crime scene when the attack occurred. In addition, prosecutors neglected to produce before trial a detective's interview notes confirming that Sirena was present during the attack and revealing that an eyewitness saw Sirena holding a "cocked" baseball bat shortly before the victim was struck.

More than four years after Bustillo's 1998 trial, the suppressed evidence was produced in the course of these habeas proceedings. The Circuit Court of Fairfax County determined that the prosecution had improperly withheld that exculpatory information. Ultimately, however, it concluded that the evidence was not "material." The Circuit Court issued two written opinions, making factual findings and articulating the purported basis for denying relief under *Brady v. Maryland*, 373 U.S. 83 (1963). The present petition for appeal followed.

Respondent now urges this Court to dismiss the petition for appeal in its entirety or, in the alternative, to strike the assignments of error relating to the *Brady* claims. Although respondent does not dispute that the transcripts of petitioner's trial are part of the record on appeal, respondent seeks to have the entire petition for appeal dismissed because the Circuit Court Clerk initially neglected to forward (but has since done so) the trial transcripts when it sent the rest of the record.[1] Respondent also urges the Court to dismiss the assignments of error related to the *Brady* claims because the transcripts of two hearings before the Circuit Court on habeas are not part of the record—even though all of the assignments of error relate to *legal errors* contained in the Circuit Court's opinions; even

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[1] It is undisputed that Petitioner was in no way responsible for the Circuit Court Clerk's failure to transmit the trial transcripts.

though those opinions include extensive factual findings regarding all issues relevant to the appeal; and even though the record includes all of the transcripts and exhibits of the 1998 trial, all of the wrongfully withheld exculpatory materials, and the parties' extensive pleadings and motions in the Circuit Court habeas proceedings. As explained below, respondent's motion to dismiss is meritless.

I. This Court's Rules Foreclose Dismissal Based On The Circuit Court Clerk's Initial Failure To Transmit The 1998 Trial Transcripts With The Rest Of The Record, And The Transcripts Are Now Properly Before This Court.

Respondent concedes that the transcripts of petitioner's 1998 criminal trial are part of the record in this case. *See* Motion to Dismiss at 4 n.2. Nonetheless, respondent urges the Court to dismiss the petition for appeal because, "for reasons that are not clear," the 1998 trial transcripts "were not forwarded to this Court." *Ibid.* That request is squarely foreclosed by this Court's Rules, which make it clear that the Circuit Court Clerk's failure to transmit the trial transcripts to this Court is *not* a basis for dismissal. "The failure of the clerk of the trial court to transmit the record as herein provided," Rule 5:13(c) declares, "shall not be a ground for dismissal of the appeal by this Court." The suggestion that the 1998 transcripts' temporary absence warrants dismissal of the appeal is thus wholly baseless.

The more appropriate course—given the Circuit Court Clerk's inadvertent failure to transmit the entire record as required by this Court's Rule—would have been to urge the Circuit Court Clerk to correct its mistake. For that reason, when the Commonwealth's counsel sought petitioner's consent to a proposed extension of time, the petitioner's counsel urged him to postpone filing the motion for a day to see if the Circuit Court Clerk could promptly rectify its error. Counsel for the Commonwealth declined to do so. In any event, counsel for petitioner has since contacted the Clerk;

the Clerk's office has advised that the entire record, including the transcripts of the 1998 trial, have now been transmitted to this Court; and we are advised that this Court has received those transcripts. Respondent then filed a motion on September 23, 2004, to conditionally withdraw its arguments based upon the 1998 transcripts if this Court determines the transcripts are properly before it.[2] To the extent the argument is not withdrawn, it should be rejected.

II. The Circuit Court Habeas Transcripts Are Not Necessary To This Court's Consideration Of The Circuit Court's Materiality Analysis Under *Brady*.

In the alternative, respondent urges the Court to dismiss some or all of the assignments of error relating to petitioner's *Brady* claims because two transcripts of hearings before the Circuit Court on habeas are not part of the record. This Court's Rule 5:11(b), however, provides that, if petitioner fails "to ensure that the record contains transcripts or a written statement of facts *necessary to permit resolution of appellate issues*, any assignments of error affected by the omission shall not be considered" (emphasis added). Respondent fails to demonstrate that the omitted transcripts would even be helpful, much less that they are "necessary" as required by Rule 5:11(b). To the contrary,

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[2] Although respondent's September 23, 2004, supplement purports to withdraw that part of the motion, it suggests that the 1998 trial transcripts *still* may not be properly before this Court, citing *Godfrey v. Commonwealth*, 227 Va. 460, 465, 317 S.E.2d 781, 784 (1984). That case is inapposite. *Godfrey* concerned an attempt to add material to the record on appeal *after* this Court had decided to hear the case. "After the record has been transmitted to this Court . . . *and an appeal has been granted*, the record on appeal cannot be enlarged except by our award of a writ of certiorari under Code § 8.01-673." *Id.* at 465, 784 (emphasis added). Here, by contrast, this Court has not yet acted on the petition for appeal. In any event, to the extent one is required, petitioner urges the Court to treat this brief as a conditional petition for such a writ.

as explained below, the transcripts are wholly unnecessary because the errors assigned in the Petition for Appeal are purely legal in nature—they address legal defects in the Circuit Court's reasoning and analysis that led it to an incorrect result. The only facts or evidence necessary to evaluate the petition are in the record, in the form of petitioner's original trial transcript and the improperly withheld evidence, as well as unchallenged factual findings by the Circuit Court.

A. Petitioner's Assignments Of Error Raise Legal Issues

Petitioner's Assignments of Error present legal questions that, by their very nature, are not dependent upon the testimony collected in the habeas proceedings. "[T]his Court will consider any question of law properly raised as to matters appearing on the face of the record." *Smyth v. Midgett*, 199 Va. 727, 729, 101 S.E.2d 575, 578 (1958); *see also ibid.* ("In this case the record consists of the pleadings, exhibits filed therewith and the orders of the lower court, which record is sufficient for the Court to pass on the questions of law raised by respondent."); *Salmon v. Commonwealth*, 32 Va. App. 586, 590, 529 S.E.2d 815, 817 (2000) (Where "the issue before [the court] is purely a question of law, . . . the hearing transcript is not indispensable to the resolution of the issue on appeal."). The errors assigned here do not purport to challenge the Circuit Court's factual findings. Rather, the appeal urges that the Circuit Court incorrectly held the exculpatory evidence to be immaterial (assignment of error 1) because of four additional legal errors: *first*, its erroneous effort to reconcile the suppressed exculpatory evidence with the trial verdict rather than to weigh that evidence's potential effect (assignment of error 2); *second*, its failure to consider the facts that the alternative suspect (Sirena) gave inconsistent statements about where he was coming from and falsely denied having been at the crime scene (assignment of error 3); *third*, its failure

to conduct its analysis of the suppressed evidence in light of divided eyewitness testimony at trial (assignment of error 4); and *fourth*, its erroneous decision to accord "instrumental" significance to trial counsel's opinion regarding the impact the exculpatory evidence might have had (assignment of error 5). *See* Petition for Appeal at 14. Those assignments address the method of the Circuit Court's analysis and its ultimate legal conclusion on materiality.

Accordingly, respondent flatly errs in suggesting, Motion to Dismiss at 3, that the absence of the transcripts of the habeas hearings somehow forecloses this appeal. The general rule that the facts are viewed in the light most favorable to the prevailing party makes no difference here, because the facts are not at issue; only the Circuit Court's legal analysis is. In any event, as discussed below, the Circuit Court in this case made specific findings of fact, and the transcripts of petitioner's 1998 criminal trial provide all the facts necessary for resolution of the appeal.

B. The Circuit Court's Opinion Contains Ample Facts To Permit Resolution Of The Appeal

To the extent resolution of these issues requires an understanding of the factual context in which they arise, the Circuit Court's factual findings—set forth in two different opinions—are more than sufficient to permit meaningful review. May 4, 2004, Opinion (unpublished); Sept. 16, 2003, Opinion (published in *Bustillo v. Johnson*, 63 Va. Cir. 125 (2003)). Virginia appellate courts regularly rely upon factual discussion contained in the lower court's opinion where a transcript is not available. *See, e.g., Carlton v. Paxton*, 14 Va. App. 105, 111-12, 415 S.E.2d 600, 603 (1992) ("The record here contains neither a transcript nor a written statement of facts; it does include the trial court's opinion letter of December 4, 1989, in which the court sets out in extensive detail the facts which, ultimately, stand as the basis for this appeal. This court may rely on this statement of the facts in this case.") (citing *Clark v.*

Commonwealth, 4 Va. App. 3, 4 n.1, 353 S.E.2d 790, 791 n.1 (1987)); *Goodpasture v. Goodpasture*, 7 Va. App. 55, 371 S.E.2d 845 (1988) ("The trial court's letter opinions . . . and order . . . sufficiently set forth the facts of the case. . . . Therefore, we deny [appellee's] motion to dismiss this appeal for failure to file a transcript."). Respondent's generalized complaint that the Circuit Court's opinion contains "characterization or summary of the testimony, not the actual testimony," Motion to Dismiss at 3, is thus an inadequate basis for dismissing the appeal.

Here, in any event, the Circuit Court's findings are sufficiently detailed to allow a thorough review of the assignments of error. That court's two opinions extensively describe the omitted evidence as well as the testimony of Dr. Peter Bernad, Yahayra Quierola, Amilcar Amaya, and David Bernhard, which the court considered in determining materiality. May 4, 2004, Opinion at 4-9. The Circuit Court not only recited the substance of those witnesses' testimony, but also explained its relevance to and impact upon the court's analysis. Those opinions, particularly in combination with the 1998 trial transcript, the *Brady* evidence itself, and the voluminous pleadings and exhibits in the record, constitute a more than adequate basis for deciding the issues presented here. That is especially true given that each and every one of the assignments of error is purely legal, challenging only the Circuit Court's reasoning and choice of legal standards, not its factual findings.[3]

Respondent's complaint that the Circuit Court's opinion is insufficient because it fails to discuss other witnesses'

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[3] If there is any doubt about whether the habeas transcripts are truly necessary to resolution of the materiality issue on appeal, it is important to note that courts routinely assess materiality *without* an evidentiary hearing, simply by evaluating the exculpatory evidence in light of the evidence at trial. *See, e.g., Robinson v. Commonwealth*, 231 Va. 142, 152, 341 S.E.2d 159, 165 (1986); *United States v. Ellis*, 121 F.3d 908, 915-18 (4th Cir. 1997).

testimony at the habeas hearings, Motion to Dismiss at 7, is likewise baseless. Respondent's motion fails to identify any omitted testimony it believes would be helpful—much less necessary—to resolve the assignments of error. Where, as here, the movant fails to provide an adequate basis justifying the relief it seeks in its initial moving papers, the motion must be denied.[4]

C. Respondent's Speculation About Potential Waivers Is Specious

Unwilling or unable to identify *any* evidence in the habeas proceedings transcripts necessary to resolve the purely legal issues raised in the petition for appeal, respondent suggests that, absent the transcripts, the record does not indicate whether petitioner properly raised and preserved the assignments of error. Motion to Dismiss at 3. Respondent's unsubstantiated speculation about possible waivers is without merit. With respect to assignment of error 1, respondent *concedes* that petitioner properly raised the materiality issue before the Circuit Court. Respondent, moreover, nowhere denies that the Circuit Court *actually resolved* the materiality issue on the merits in its 10-page opinion.

Nonetheless, respondent claims that petitioner's "assertions, made before the hearing, do not suffice to preserve the issue." Motion to Dismiss at 3. Respondent, however, cites no legal authority to support the claim that there can be a waiver of an issue actually pressed and passed upon by the Circuit Court. For one thing, the Circuit Court certainly found no waiver. It issued a lengthy opinion *directly addressing the materiality question*, confirming that the issue was very much alive before, during, and after the hearing. May 4, 2004, Opinion at 1 ("[T]his matter came

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[4] In any event, petitioner has expressly waived any objection should respondent wish to rely upon the omitted transcripts in the Court. Petition for Appeal at 3 n.1.

before the Court . . . for a limited evidentiary hearing on the issue of materiality with respect to certain exculpatory evidence the Commonwealth of Virginia failed to disclose to the defense prior to the 1998 murder trial of Bustillo."); *id.* at 10 (concluding the evidence was not material). Respondent offers no reason to believe the Circuit Court somehow erred and nowhere suggests that the Commonwealth argued waiver before the Circuit Court. Having properly raised the issue, petitioner was not required to mindlessly repeat and restate its position that the suppressed evidence continued to be material as each bit of evidence was presented. In any event, it is settled law that a party, having raised the issue with sufficient clarity that the Circuit Court actually addresses it, is not required to burden the court by re-raising an issue time and again. Virginia Code § 8.01-384(A) ("No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court."). Respondent's suggestion that the issue of materiality, pressed before the Circuit Court and addressed by it in a 10-page opinion, might be "waived" is thus meritless.

Respondent further claims that "the record fails to reveal *any* objection by the petitioner" with respect to assignments of error 2 through 5. Motion to Dismiss at 3. But those assignments of error do not relate to events occurring during a trial or a hearing where objections could be made. They identify *legal errors manifested for the first time in the Circuit Court's May 4, 2004, opinion.* Respondent cites no authority to support the absurd proposition that petitioner was obligated to clairvoyantly object to the legally flawed analysis that would be revealed in the Circuit Court's opinion. Nor does respondent attempt to explain how Petitioner could have foreseen that the Circuit Court's opinion would employ an incorrect legal analysis, flatly

ignore certain pieces of evidence, and erroneously accord "instrumental" significance to other testimony. *See* Virginia Code § 8.01-384(A) ("[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal."). At the time the trial court sent out its erroneous decision by letter, there were no more hearings to be held, no further proceedings to conduct, and no forum in which to object. And the law is clear that, once the Circuit Court issued its opinion containing the flawed analysis, petitioner was not obliged to return to the Circuit Court raising the errors through (yet another) motion for reconsideration. Virginia Code § 8.01-384(A).

In sum, the record amply demonstrates that petitioner raised and preserved each issue, and there is no credible basis for respondent's unsupported assertions of waiver.

CONCLUSION

In this case, Petitioner was sentenced to 30 years' imprisonment for a crime he did not commit. Petitioner respectfully submits that the rules should be construed to permit this Court to consider whether he was denied a fair trial by reason of the Commonwealth's unquestioned violation of its *Brady* obligation. Because this Court can analyze the necessary issues based on the record before it, respondent's motion to dismiss should be denied.

IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 042023

MARIO A. BUSTILLO
Appellant

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS
Appellee

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR AN APPEAL (HABEAS) IN THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

After Bustillo was convicted, he discharged his attorney and hired new counsel. From that moment, his case metamorphosed from a thorough criminal defense into a crusade, in the courts and in the press, against the police and prosecutors who brought him to justice. All of the petitioner's original outlandish post trial and habeas claims of "police jury tampering, coaching of eyewitnesses, intimidation of witnesses causing some to perjure themselves and at least two others to remain silent," (H.R. 5), and ineffective assistance of counsel were found to be groundless and have been abandoned on appeal in their entirety.

What remains, aside from the legally meritless Vienna Convention claim, are Bustillo's arguments based on purportedly exculpatory information produced during habeas discovery. The trial court properly found—after extensive

briefing and two evidentiary hearings—that there was no reasonable likelihood these items would have produced a different outcome.

Finally, the petitioner devotes much of his brief to the argument that he is innocent. He claims that an individual nicknamed "Sirena" is the one really guilty of the murder of James Merry. He neglects to mention what Virginia courts have long held, that innocence is not at issue in a habeas corpus proceeding. *See, e.g., Virginia Parole Bd. v. Wilkins*, 255 Va. 419, 420-21, 498 S.E.2d 695, 696 (1998).

STATEMENT OF THE CASE

After a jury trial on March 17–20, 1998, Bustillo was found guilty of the murder of James Merry. Bustillo later filed a motion to set aside the verdict. (T.R. 150-168).[1] Following two evidentiary hearings, that motion was denied. The petitioner filed a renewed motion to set aside the verdict. (T.R. 209-14). That motion was denied without a hearing by letter dated October 7, 1998. (T.R. 234-39). By final order dated October 8, 1998, the Court imposed a sentence of 30 years on the charge of murder. (T.R. 203-04).

The petitioner unsuccessfully sought relief on appeal from the Court of Appeals of Virginia and this Court, Record No. 001110. The Supreme Court of the United States denied *certiorari* on June 4, 2001.

Bustillo then filed a petition for a writ of habeas corpus on January 13, 2002, in the Fairfax County Circuit Court. He alleged his Vienna Convention rights were violated, his attorney was ineffective in a number of particulars and the prosecution and police had engaged in numerous acts of misconduct. (H.R. 1-63). In one of his claims of prosecutorial misconduct, Bustillo asserted that the prosecution

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[1] The "T.R." abbreviation refers to the trial record, "H.R." to the habeas record. The Court should be aware that the exhibits to the habeas petition are, confusingly, filed in the record of the criminal trial, vol. 2. (T.R. 279-477).

possessed and withheld a photograph of "Sirena." (H.R. 39-40).

On May 3, 2002, the petitioner filed an "addendum" seeking to "augment" his habeas petition. He alleged that the Vienna Convention obligation was "absolute and non-delegable" but argued, in the alternative, that counsel was ineffective for failing to advise his client of his right to consult with the Honduran consulate. (H.R. 158). He later filed a motion for leave to amend his petition on this ground. (H.R. 254). The respondent objected on the ground that this amendment did not "relate back" to the original claims and was barred by the statute of limitations. (H.R. 272).

By order dated August 8, 2002, the circuit court ordered most of the habeas claims dismissed. (H.R. 285). The court dismissed the Vienna Convention claim based on *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974). The court also ordered an evidentiary hearing limited to the issue of when the Commonwealth came into possession of a photograph and a videotape of "Sirena." (H.R. 292-93).

The order did not address the "addendum" or requested amendment seeking to raise a claim of ineffective assistance of counsel for failing to inform Bustillo of his Vienna Convention rights. The respondent filed a motion for clarification, with an affidavit from trial counsel, asking the court to rule on this claim. (H.R. 310). Trial counsel explained in his affidavit that he was the son of a diplomat and was aware of the Vienna Convention. He deliberately did not advise his client of the Vienna Convention because he did not want his client to speak to anyone for fear that these conversations might be used against him at trial. (H.R. 318-19). The court entered an order amending the memorandum opinion on October 11, 2002, holding that the amendment was barred by the statute of limitations and, furthermore, had no merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). (H.R. 351).

Although Bustillo had not obtained the required leave of court to obtain discovery in a habeas case, Va. S. Ct. Rule 4:1(5)(3), he filed a motion to "compel" discovery. (H.R. 298). On October 3, 2002, the Court granted the requested discovery in part and denied it in part,[2] and ordered the respondent to produce by October 20, 2002, "the photograph of 'Sirena' a/k/a Julio Cesar Osorto Herrera . . . and any information possessed by the Fairfax Police Department pertaining to Sirena, a/k/a Julio Cesar Osorto Herrera." (H.R. 348).

The respondent produced several letters and exhibits in response to the discovery order, including a letter with exhibits dated October 10, 2002. (H.R. 365). One of these exhibits was a police report from Officer Mahoney dated December 10, 1997. The Mahoney report noted that "Osorto, Julio C." was stopped during a canvass of the area following the attack. The report notes that "Mr. Osorto has what appeared to be ketchup on his pant legs and a little on his shirt. He claimed he had come from McDonald's where he had eaten a cheeseburger . . . . He stated he lived at Chelsey Square Apts. but was confused on the address." He denied being present at the Popeye's. (H.R. 366-67).

Bustillo filed a motion for sanctions, complaining that some of the disclosures were insufficient in that they amounted to a description of the information rather than the actual notes from the detectives. (H.R. 356). On November 15, 2002, the court declined to award any sanctions and clarified its order and required the respondent to disclose, among other things, the notes from the lead detective. (H.R. 405).

Following an evidentiary hearing on December 5, 2002, the court denied habeas relief, holding that the Commonwealth had not violated the petitioner's right to obtain

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[2] The court declined to grant the petitioner's requested discovery of the personnel files of certain police officers.

Brady[3] material. (H.R. 454-58). On February 21, 2003, the court entered a final order to that effect. (H.R. 468-69). Even though Bustillo had been in possession of the Mahoney report since October 2002, he decided at that juncture to file a motion to reconsider and a motion for another evidentiary hearing, claiming that the report should have been disclosed by the prosecution at trial. (H.R. 481).[4] The Court overruled the respondent's objections and stayed its final order. (H.R. 471, 472-74). A month later, Bustillo filed a motion to amend his petition to include a new *Brady* claim for failure to disclose the police report.[5]

Bustillo filed a second motion to amend based on police notes of an interview with a gang member, Jose Armando Amaya (Canas). Although these notes are described in part in the memorandum opinion of the court, the actual notes are not a part of the habeas record as Bustillo never moved for their admission. (H.R. 483).

By letter opinion dated September 16, 2003, the court concluded that the information contained in the Mahoney report and the interview of Amaya Canas were exculpatory and should have been disclosed. Concerning the Mahoney report, the court noted, in hindsight, that the officers "*should have known*, given the contents of the investigative notes and the police report, that 'Sirena-Julio' and Julio Osorto *might be* one and the same person." (H.R. 486) (emphasis added). The court granted the motion for re-

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[3] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[4] The motion for reconsideration and the respondent's objections, for reasons that are not clear, are not a part of the record.

[5] The two motions to amend are also omitted from the habeas record. However, the respondent's objections to the amendments are included. (H.R. 472-77). Although the court held a hearing and issued a decision on these *Brady* claims, the record contains no ruling or order by the trial court specifically granting the motions to amend.

consideration and ordered a hearing to determine whether a reasonable probability existed that "had the evidence been disclosed to the defense, the result of the criminal trial might have been different." (H.R. 491).

Bustillo then filed a motion to preclude the respondent from adducing *any* evidence at the upcoming hearing. (H.R. 501). The court denied this motion. (H.R. 531-32). In addition, the circuit court ordered the file placed in protective seal in its entirety due to "unauthorized access to certain documents previously placed under seal by this Court." (H.R. 508). Later filings establish that the petitioner's counsel had improperly reviewed the sealed jury list and was seeking to contact jurors from Bustillo's criminal trial. (T.R. 89-91; H.R. 520-524).

Following an evidentiary hearing on April 7, 2004, the court issued a detailed memorandum opinion concluding that even if the evidence had been disclosed to the petitioner, there was no reasonable likelihood of a different outcome. (H.R. 558-70). This appeal, with the assistance of new counsel for the petitioner, followed.

ASSIGNMENTS OF ERROR

Bustillo assigns the following error:

1. The Circuit Court erred by denying Bustillo's petition for habeas corpus on the ground that the unlawfully withheld evidence was not material.
2. The Circuit Court erred by attempting to reconcile the belatedly produced exculpatory evidence with a guilty verdict, rather than attempting to assess the possible impact that evidence would have had upon a reasonable juror.
3. The Circuit Court erred by failing to address the impact of Sirena's inconsistent statements to Officer Mahoney on the night of the attack.

4. The Circuit Court erred when it failed to consider the impact of the wrongfully withheld evidence in light of the divided eyewitness testimony presented at trial.
5. The Circuit Court erred in affording "instrumental" significance to the self-serving testimony of trial counsel that he was "uncertain" of the impact that the wrongfully withheld evidence could have had on the jurors at trial.
6. The Circuit Court erred in holding that Bustillo's claim under Article 36 of the Vienna Convention on Consular Relations was procedurally barred.

STATEMENT OF FACTS

I. THE COMMONWEALTH'S CASE

On the evening of December 10, 1997, James Merry and three friends, Jesse Konstanty, Michelle Gutierrez and Valeria Landaeta, were inside a Popeye's restaurant, eating dinner. (Tr. 3/17/98 at 100, 102). Gutierrez looked out into the parking lot and saw three cars drive up, one parking in front of the other. The cars' occupants looked out of the windows and started pointing at them. Michelle warned her friends not to leave the restaurant because she thought something was going to happen. (Tr. 3/17/98 at 127). Michelle knew these men were members of the Commerce Street Locos, a gang. (Tr. 3/17/97 at 148).

Shortly thereafter, the men, around 15 of them, entered. Michelle knew the petitioner, Canecho, Sirena, Lisandro and Nick Parada and others, because she would often see them at the restaurant. (Tr. 3/17/98 at 128-29, 168). She also recognized Bustillo because she had seen him at Popeye's frequently the previous summer. (Tr. 3/17/98 at 129). The men were drunk, slurred their speech and threatened Merry and Jesse in Spanish, accusing them of fighting with members of their gang on another occasion. Michelle said they were mistaken, that neither Merry nor Konstanty were Hispanic or understood anything they were saying.

The group insisted, "no, it was him, it was him in the red car." (Tr. 3/17/98 at 128). She insisted in Spanish that they mistook him for someone else, because "he drives a blue car." The group looked at each other, after which the petitioner shook Merry's hand, and said, in Spanish, "Oh. I'm sorry. We got you mistaken." (Tr. 03/17/98 at 128). They said "We have no problems with you. It's your friend that we want to get an opportunity to meet." (Tr. 3/17/98 at 221). They left, and Michelle warned her friends to stay. (Tr. 03/17/98 at 130).

Nevertheless, Merry went outside to smoke a cigarette. As soon as he left, Michelle saw the others walking around the parking lot in pairs. (Tr. 3/17/98 at 157, 239-240). She then saw Merry lean against a sign and light up a cigarette. (Tr. 3/17/98 at 157). He appeared to be talking to Cristina Hondoy, who was facing him. (Tr. 3/17/98 at 163, 250). An assailant ran up, swung a baseball bat, hit Merry on the left side of his head and ran away. (Tr. 3/17/98 at 131, 181).

The blow fractured Merry's skull in several places. (Tr. 3/17/98 205). Dr. Frances Field, the medical examiner who examined Merry, testified that such an injury would cause blood to "seep" into the inner ear and then out of the ear canal. (Tr. 3/17/98 at 193). Following the attack, Merry's brain continued to swell, shutting down his other organs, and he died six days later after life supports were discontinued. (Tr. 3/17/98 at 207).

The police soon arrived and questioned a number of individuals. That night police also recovered two baseball bats at the scene, 50 to 75 yards east of the Popeye's. (Tr. 3/17/98 at 116). Neither bat had blood on it. (Tr. 3/17/98 at 108). Mario Bustillo was the only perpetrator identified to the police; not a *single* eyewitness told the police that "Sirena" struck the fatal blow. (Tr. 03/18/98 at 53, 67-68, 69).

At the time of trial, police did not know Sirena's identity. (Tr. 03/18/98 at 70). He was referred to by one witness as having a first name "Julio." Police spoke with several individuals but no one could provide them with a last name or any information about Sirena. (Tr. 03/08/98 at 70).[6]

Both Michelle and Jesse, separately and without hesitation, picked the petitioner's photo from a photo spread Detective Cline showed them. (Tr. 3/18/98 at 39, 41-42). They testified at trial that Bustillo was the assailant. (Tr. 3/17/98 at 131, 138). Valeria Landaeta also identified Bustillo as the assailant. (Tr. 3/18/98 at 21-22, 28). She went to the same school as Bustillo, where she would see him every day because she shared a class with him. (Tr. 3/18/98 at 20-21). Landaeta knew that he lived approximately five minutes from Popeye's, and she, Michelle, and another friend told the police where he lived. (Tr. 3/18/98 at 22-23, 43).

Detective Cline noted that the lighting outside the restaurant was very good, and despite a small amount of glare, he could still clearly see the facial features and clothing of a person in the parking lot without any difficulty. (Tr. 3/18/98 at 44-45).

II. THE PETITIONER'S SIRENA THEORY

At trial, Bustillo claimed that a gang member named "Sirena" was responsible for the attack. He adduced testimony from Amilcar Amaya, who said he observed "Señor Julio," a/k/a Sirena, walk towards the area where Merry was standing. When he was close, he moved to the right, took out a bat and hit Merry on the side of the head. (Tr. 3/18/98 at 98-100, 110). Amaya testified that he did not see the petitioner there that evening at all, either inside or outside the restaurant, and stated that he was the one who

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[6] Sirena is referred to variously as Julio Sorto, (Tr. 03/18/98 at 70); Ostorto, Julio (H.R. 402-03), Osorto, Julio C., (H.R. 366-67) and Julio Cesar Osorto Herrera, (T.R. 381, 390).

shook hands with Merry inside the restaurant. (Tr. 3/18/98 at 101).

Johnny Sejas testified that the night of December 10, between 8:00 and 9:00 p.m., he saw Bustillo drive his father's truck into the parking lot at 7209 Lockport Place in Lorton, Virginia. (Tr. 3/18/98 at 173-176). Ulma Martinez said she noticed Sirena, on December 17, 1997, on a flight bound for Honduras. (Tr. 3/18/98 at 167-169).

III. POST-TRIAL MOTIONS

Bustillo filed a motion to set aside the jury's verdict. (T.R. 150-161). He supplemented this motion with an addendum. (T.R. 162-168). In that motion, he alleged 1) insufficient evidence, 2) newly discovered evidence through "new" witnesses (Giovany Hernandez, Marvin Escobar and Jose Maldonado), and "false trial testimony" (Valeria Landaeta), 3) "illegally obtained evidence" in the form of alleged threats by Detective Cline to Nicholas Parada, and 4) a *Brady* violation, for the alleged nondisclosure of an allegedly exculpatory statement from Yahayra Quierolo.

The court held a hearing on the motion. Among other witnesses, Valeria Landaeta testified to the extensive pressure placed on her by a gang member to recant her testimony. (Tr. 7/13/98 at 180-182, 211). The court denied the motion, finding *inter alia* the allegations of police misconduct not credible. (Tr. 07/13/98 at 246-269).

Bustillo filed a renewed motion to set aside the verdict, claiming still more newly discovered evidence and further allegations of police misconduct. (T.R. 209-14). The court again denied the motion. (T.R. 234-39).

ARGUMENT

I. ASSIGNMENTS OF ERROR 1 THROUGH 5 ARE BARRED FROM APPELLATE REVIEW.

This Court has ruled that the transcripts were not timely filed. Accordingly, the issues for which the transcripts are

necessary cannot be reviewed on appeal. *Towler v. Commonwealth*, 216 Va. 533, 534, 221 S.E.2d 119, 121 (1976). Bustillo says in a footnote of the introductory statement of his petition for appeal that "the transcripts . . . are not necessary to resolve the questions presented by this case." (Pet. at 3, n. 1). The respondent disagrees.

It is impossible to achieve elementary functions of appellate review without the transcripts. First, this Court cannot, without the transcripts, view the totality of the evidence in the light most favorable to the prevailing party. *See Burns v. Commonwealth*, 261 Va. 307, 313, 541 S.E.2d 872, 877 (2001). In addition, the transcripts would reveal whether the petitioner preserved any of the issues raised on appeal and made the specific arguments now advanced. *See* Rule 5:25.

Attempting to circumvent the lack of transcripts, the petitioner cites liberally to the factual discussion contained in the memorandum opinion of the trial court. However, that opinion represents the court's characterization or summary of the testimony, not the actual testimony. Among other things, the memorandum opinion does not discuss at all the testimony of the many witnesses presented by the respondent.

In his reply to the motion to dismiss these assignments of error, Bustillo claims that the transcripts are unnecessary because the errors assigned in the petition for appeal are "purely legal in nature." However, the legal argument, particularly on *Brady* issues, cannot be abstracted from the detailed facts of the case. Indeed, Bustillo's extensive factual discussion in his own petition betrays the lack of merit of this argument.

In the same reply, Bustillo also cites four cases from the Court of Appeals of Virginia in support of his argument that a memorandum opinion by a trial court excuses the need for a transcript. It is telling that the petitioner cannot locate a

single decision from *this Court* in support of this assertion. The cases from the Court of Appeals represent, at best, non-binding persuasive authority. Furthermore, those cases did not involve an assertion by the appellee, as in this case, that many, if not most, of the specific arguments on appeal were not made at trial and hence are procedurally defaulted.

Finally, the transcripts would have presented critical evidence in support of the respondent's contention that there was no blood "spatter"—as opposed to blood seepage—at the scene and that the stains on "Sirena's" clothes were not blood. At the hearing, the respondent adduced evidence from the medical examiner who performed the autopsy on the victim; three firefighters who were at the crime scene and one police officer, all of whom testified to the lack of blood spatter. Finally, one of the officers who detained Sirena on the night of the attack testified about his observations of the red "stains" on Sirena. Due to the absence of transcripts, this Court cannot review this evidence.

For these reasons, the respondent renews his motion, held in abeyance by this Court, that assignments of error 1-5 be dismissed.

II. THE TRIAL COURT PROPERLY CONCLUDED AFTER TWO EVIDENTIARY HEARINGS THAT THE PETITIONER'S *BRADY* CLAIMS DID NOT WARRANT HABEAS RELIEF.

Without waiving the argument above concerning the necessity of the transcript, and given the posture of the case, the respondent will address the petitioner's *Brady* arguments based on the memorandum opinion of the trial court.

A. Standard of review.

On appeal, this Court will defer to a circuit court's factual findings and is bound by them unless they are plainly wrong or without legal support. Questions of law,

however, are reviewed *de novo*. *See Lovitt v. Warden*, 266 Va. 216, 229, 585 S.E.2d 801, 808 (2003) (citation omitted) (reviewing capital case under Va. Code § 8.01-654(C)).

B. Standard of review for non-disclosure of exculpatory evidence.

> [A] due process violation occurs when the prosecution suppresses evidence favorable to an accused that is material either to guilt or to punishment, irrespective whether the prosecution acted in good faith or bad faith . . . .
>
> Exculpatory evidence is material if there is a reasonable probability that the proceeding would have resulted in a different outcome had the evidence been disclosed to the defense . . . . A "reasonable probability" is one that is sufficient to undermine confidence in the outcome of the proceeding . . . . At the heart of this inquiry is a determination whether the evidence favorable to the defendant could reasonably be considered as placing the entire case in such a different light that confidence in the verdict is undermined.

Lovitt, 266 Va. at 244, 585 S.E.2d at 817 (citations omitted).

C. The Mahoney report creates no reasonable likelihood of a different outcome.

1. The ketchup stains.

To establish the materiality of what Bustillo calls the "red stains" indicated on the Mahoney report, Bustillo had to show that (1) the wound sustained by the victim caused a rapid spray of blood and (2) that the bleeding likely landed on the assailant so as to explain the "red" stains. The trial evidence was uncontested that the assailant struck a single blow to the left *side* of Merry's head, followed by immediate flight. This circumstance alone makes it extremely improbable for any blood to immediately spurt out of the victim's ear and land on the assailant. Furthermore, no blood was found on the bats. It is inconceivable that blood would

spray out and land all over the assailant without landing on the bats themselves. Moreover, common experience shows that ketchup stains retain their vivid red color, whereas blood stains rapidly darken. The petitioner repeatedly describes the stains as "red" while ignoring the notation in the Mahoney report that Osorto had what appeared to be "ketchup" on his clothes.

The trial court made factual findings consistent with the crime scene photographs, and the medical and non-medical evidence that the blood found at the scene was from seepage and not from "spray" or "spatter." (H.R. 562). The court was certainly not required to credit the petitioner's medical expert, Dr. Bernad. Second, the trial court specifically, and very logically given their many contradictions, found that the testimony of Amilcar Amaya and Queirolo, who claimed to have observed blood spray land on Sirena, was not credible. (H.R. 563). All of these facts would have been as obvious to a jury as they were to the trial court.

2. Sirena's statements.

Bustillo emphasizes the contradictory and inculpatory nature of Sirena's statements concerning his whereabouts, as memorialized in Officer Mahoney's report. (Pet. at 21-22). First, the reviewable record does not show that this argument was made at trial. Therefore, it is barred by Rule 5:25. Second, Bustillo does not explain how these hearsay statements by Sirena would have been admissible. This Court has held that "[e]vidence that is inadmissible at trial is not 'evidence' at all, for *Brady* purposes . . . . Thus, it is not 'reasonably likely' that disclosure of such information would result in a different outcome at trial." *Soering v. Deeds*, 255 Va. 457, 464, 499 S.E.2d 514, 518 (1998). Even if the statements could be admitted, it would hardly be surprising that a gang member who had just been present at the scene of a vicious attack would deny his presence at the scene.

3. Other arguments.

Bustillo also asserts that had he possessed the Mahoney report, he would have obtained a photograph of Sirena and obtained a videotape of a purported confession from him. (Pet. at 23-24). These arguments were never made in the trial court. Therefore, they are barred under Rule 5:25. In addition, the argument concerning the photograph is without merit for the reasons articulated below in response to the Vienna Convention argument. Bustillo further says that, had he known of this report, he *might* have withdrawn his alibi defense. (Pet. at 24). Again, this argument was not made at trial, Rule 5:25, and is based on sheer speculation. He also says he would have confirmed Sirena's existence. Again, the reviewable record does not show this argument was made below. Therefore, it is likewise barred. Rule 5:25.

D. Detective Cline's notes of his meeting with Amaya create no reasonable likelihood of a different outcome.

As noted above, this note from Detective Cline does not appear to have been moved into evidence and is not contained in the trial record. However, it is described in the memorandum opinion. (H.R. 559, n. 6). Prior to Bustillo's criminal trial, the Commonwealth disclosed in discovery, that

> Jose Armando Amaya told law enforcement that he saw the defendant and Sirena at the scene and both had bats. They approached the victim with Sirena behind the defendant. His view was obstructed by a brick pillar and he couldn't tell which one struck the victim.

(T.R. 17). The petitioner says the Commonwealth should have further disclosed the fact that the notes contain a notation that he observed Sirena with a "bat cocked," running toward the petitioner. The trial court sensibly found those notes would have made no difference.

First, Detective Cline's notes would not have made a difference because trial counsel would not have called Amaya a/k/a Canas as a witness. (H.R. 566). The trial court commended counsel on his testimonial candor in that regard. (H.R. 566). Therefore, the notes could not have had any impact on the case.

Second, Amaya Canas said that Sirena was running *behind* Bustillo. For a defense that relied on an alibi, placing the petitioner at the scene, bat in hand, running ahead of Sirena, would have proved devastating. This is particularly so because Amaya Canas was a member of Bustillo's gang. (T.R. 288). Indeed, it would have, at a minimum, established Bustillo's guilt as a principal in the second degree, punishable to the same extent as a principal in the first degree. *See Mochring v. Commonwealth*, 223 Va. 564, 567, 290 S.E.2d 891, 892 (1982) ("A principal in the second degree is one who is not only present at a crime's commission, but one who also commits some overt act, such as inciting, encouraging, advising, or assisting in the commission of the crime or shares the perpetrator's criminal intent."). "[A] principal in the second degree may be indicted, tried, convicted, and punished in all respects as if a principal in the first degree." *Taylor v. Commonwealth*, 260 Va. 683, 687-688, 537 S.E.2d 592, 594 (2000) (citing Code § 18.2-18). The small gain of placing Sirena at the scene would have been more than outweighed by the extremely damaging aspect of Amaya's testimony.

E. The trial court cited and applied the correct standard.

First, the petitioner takes no issue with the legal standard set forth by the trial court in assessing *Brady* material. Rather, he challenges the trial court's application of the standard. A review of the memorandum opinion shows that the trial court carefully weighed the evidence in its totality, including Dr. Bernad's internally inconsistent opinion and the testimony of trial counsel, in reaching its

conclusion. These factual conclusions are entitled to deference on appeal. *Lovitt*, 266 Va. at 229, 585 S.E.2d at 808. Further, it is impossible to assess the trial court's weighing of the evidence, including trial counsel's testimony and Dr. Bernad's testimony, without the transcripts of the habeas hearing. Finally, the *Brady* standard is a *reasonable* probability of a different outcome, not *any remote possibility* a juror would have reached a different conclusion. The petitioner's evidence, when subjected to proper scrutiny, utterly failed to meet the materiality standard.

III. THE TRIAL COURT PROPERLY HELD THE VIENNA CONVENTION ISSUE DEFAULTED.

The Vienna Convention is a 79-article multinational treaty. Under Article 36, the treaty requires an arresting government to notify a foreign national of his right to contact his consul. Vienna Convention on Consular Relations and Optional Protocol on Disputes (Vienna Convention), 21 U.S.T. 77, T.I.A.S. No. 6820 (Apr. 24, 1963).

A. The Vienna Convention creates no individual rights.

Bustillo argues that his Vienna Convention rights were violated. This Court held in *Kasi v. Commonwealth*, 256 Va. 407, 419, 508 S.E.2d 57, 64 (1998) that the provisions of the Vienna Convention on Consular Relations create no legally enforceable individual rights. *See also Shackleford v. Commonwealth*, 262 Va. 196, 197, 547 S.E.2d 899, 905 (2001). The recent decision by the International Court of Justice *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J. 128 (March 31) (hereafter *Avena*), a dispute between two sovereign nations, does not change this fact. Accordingly, Bustillo cannot raise this issue.

B. The issues are defaulted.

Bustillo argues that state rules of procedural default and timeliness are inapplicable to the litigation of Vienna Con-

vention claims. Most tellingly, the petitioner does not cite ***any*** federal or state case in support of this argument. The only case on point found by the respondent decided after the *Avena* decision is *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). In *Medellin*, the Fifth Circuit Court of Appeals held that the petitioner's challenge to his state convictions based on the Vienna Convention was procedurally defaulted and also failed because the Vienna Convention did not create any individually enforceable rights. *Id.* at 279-80.

It is also well established in Virginia that a habeas petitioner defaults issues of federal constitutional law if they are not properly or timely presented. *See, e.g., Mueller v. Murray*, 252 Va. 356, 367, 478 S.E.2d 542, 549 (1996) (Eighth Amendment claim barred by *Slayton v. Parrigan*). If issues of constitutional moment can be defaulted, it is difficult to see why a treaty, which is itself subordinate to the federal constitution, should escape from this rule.

Second, this view would lead to absurd results. If Bustillo's argument were accepted, such claims could be raised at any time—including decades after the termination of trial and direct appeal proceedings. Likewise, the successive petition bar of Virginia Code § 8.01-654(B)(2) would not apply. Consequently, under Bustillo's view, a habeas petitioner could file a weekly Vienna Convention petition and state courts would be required to adjudicate it. Nor would a petitioner who had fully litigated such a claim be precluded by "subordinate" state rules of *res judicata* or collateral estoppel from raising the claim anew.

Bustillo's reliance on the *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27), is misplaced. This Court examined that decision in *Bell v. Commonwealth*, 264 Va. 172, 187-88, 563 S.E.2d 695, 706 (2002), and held that "the ICJ, contrary to Bell's assertion, did not hold that Article 36 of the Vienna Convention creates legally enforceable individual rights that a defendant may assert in a state criminal

proceeding to reverse a conviction." If that is true on direct appeal, it is at least equally so on collateral review.

C. The constitutional standard of effective assistance of counsel precludes relief.

The petitioner faces an additional hurdle in this case. His trial counsel—who was raised in diplomatic circles—stated that he purposefully did not advise his client of his Vienna Convention rights. He feared that if the petitioner spoke with a consular official, these statements could prove harmful because diplomats are wont to talk. (H.R. 314-15). The trial court credited this statement and further held the claim of ineffective assistance of counsel was without merit under *Strickland v. Washington*. (H.R. 351). The tactical decision by counsel vitiates any claim of prejudice caused by any failure of the state to notify Bustillo of his rights under the Convention.

On appeal, Bustillo argues for the first time that the failure by counsel to advise his client of his Vienna Convention rights constituted *per se* ineffective assistance. (Pet. at 32, n. 5). This argument was never made to the trial court and is barred by Rule 5:25. Nor is it the subject of an assignment of error. Therefore, this Court should not reach the issue.

Furthermore, Bustillo cites no authority to support his assertion that trial counsel is *per se* ineffective if he does not advise his client of his rights under the Vienna Convention. He attempts to analogize the Vienna Convention rights to the fundamental right to a jury trial, which counsel may not unilaterally waive. (Pet. at 32, n. 5). However, a petitioner's rights under the Vienna Convention are not analogous to the centuries-old right to a jury trial. This Court, examining a different fundamental right, has noted that "[t]he language of Article 36 does not create a fundamental right comparable to the privilege against self-incrimination." *Bell*, 264 Va. at 189, 563 S.E.2d at 707.

Moreover, in the *Avena* decision, Mexico argued that "the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings . . . ." *Avena*, 2004 I.C.J. at ¶ 124. The International Court of Justice held that this was

> not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that Mexico draws from its contention in that regard.

Id.

Counsel's tactical decision, based on his own experience in diplomatic circles, and to which the deferential *Strickland* standard of review applies, was eminently reasonable. The ***constitutional*** standard of review of counsel's performance articulated in *Strickland* cannot be subordinate to a treaty.

D. The petitioner can show no prejudice.

1. The photograph

Bustillo asserts that had the Honduran authorities been alerted, they could have obtained confirmation of Sirena's identity and produced a photograph. Bustillo claims that "once presented with a photograph after trial, numerous witnesses identified Sirena as the assailant." (Pet. at 33). In fact, the photograph would not have made any difference because the proffered testimony in the affidavits attached to the habeas petition is utterly unworthy of belief by any sentient factfinder.

The petitioner contends that "numerous witnesses" can now identify Sirena from the photograph. These witnesses consist chiefly of a parade of obviously biased gang members: Amilcar Amaya, Lisandro Parada, Marvin Escobar and Godofredo Jimenez. (T.R. 465, Tr. 03/18/98 at 90-91; Tr. 07/13/98 at 39, 54). All of these "witnesses" have pro-

vided conflicting accounts and have shown what could be charitably described as a remarkable flexibility in their recollection. This flexibility would have been obvious to any fact-finder.

When interviewed by trial counsel, Escobar—who had known Sirena for three years and Bustillo for one year—said he did not know who struck the blow. (Tr. 07/13/98 at 94-95). By the time of the post-trial motion to reconsider, he was sure it was Sirena. (Tr. 07/13/98 at 43). Following the April 4, 2004, hearing, the trial court specifically found Amilcar Amaya's testimony was not credible and specifically noted his inconsistencies. (H.R. 563). Jimenez, contrary to his current version, told the police that Bustillo was present—undermining Bustillo's alibi—and he did not see who committed the assault. (T.R. 229).

Claudia Tafur, Esmirna Christina Hondoy and Yahayra Queirolo also provided affidavits in support of the habeas petition and each also identified Sirena from the photograph as the assailant. (T.R. 285, 388, 392, 497). Although they are not gang members, their testimony is so vacillating and implausible that it verges on self-parody.

Tafur said on the evening of the attack, December 10, 1997, that Bustillo was the assailant. (T.R. 285). Tafur knew Sirena because she previously ***dated him*** and she went to school with Bustillo. (T.R. 388). A year and a half later, on June 16, 1999, she had come to understand that she "did not see enough of the assailant's face to be able to accurately concluse [sic] who it was." (T.R. 285). By December 18, 2001, ***four years*** after the attack, her memory had improved to the point where she now knew that Sirena was really the assailant. (T.R. 388).

Hondoy noted in her habeas affidavit that the photograph of Julio Osorto Herrera "resembles the person who struck Merry." (T.R. 392). However, she told the police the day after the attack that she knew Bustillo and that she saw

him strike Merry with the bat. (Tr. 03/18/98 at 188-190; T.R. 180). Following the attack, she obtained money from the petitioner's father. (Tr. 03/18/98 at 149-50). By the time of trial, she was sure Bustillo was not the assailant. (Tr. 03/18/98 at 142-43). At that point, she had "no idea who the person is" that attacked Merry. (Tr. 03/18/98 at 142-43). She also could not recall whether she told the police she knew Bustillo. (Tr. 03/18/98 at 157).

Queirolo told Detective Cline that she saw Bustillo swing the bat, but did not see the actual impact. (T.R. 179). She said she had known Bustillo for a year, and had seen him at "parties and stuff." (Trial exhibits, Def. Exh. I; Tr. 06/17/98 at 12; T.R. 467). Queirolo said she knew Sirena because one of her friends used to date him. (T.R. 467). Several weeks before trial, she became unsure, but she said the assailant "could be" Bustillo. (Tr. 06/17/98 at 13-14). Three and a half years later, on August 1, 2001, she became convinced the attacker was Sirena. (T.R. 467).

Given these circumstances, there is no reasonable probability that any reasonable fact-finder would credit such inconsistent testimony. Indeed, it would likely *strengthen* the fact-finder's conclusion that Bustillo was guilty. The trial court made this observation at the hearing on the motion to reconsider the verdict, noting that adducing testimony from such witnesses "if anything, it may have produced a more harsh result . . . ." (Tr. 07/13/98 at 260-61).

Moreover, these witnesses were all known to trial counsel, who made a tactical decision not to call them. (H.R. 242-46; Tr. 06/17/98 at 14; Tr. 07/13/98 at 92-93, 102). Since the witnesses were purposefully not called at trial, Bustillo's claim of prejudice evaporates.

In addition, Bustillo obtained a photograph of Sirena nearly three months before the trial court entered its final order. (Tr. 07/13/98 at 143-45; T.R. 244). If he wanted to test the recollection of the Commonwealth's witnesses with

that photograph, he certainly had the opportunity to do so before final judgment. He did so with Queirolo in a post-trial hearing. (Tr. 06/17/98 at 10). Instead, he chose to forego the opportunity.

Finally, since the vast majority of these witnesses knew Sirena, some of them over a period of *years*, many shared membership in the Commerce Street Locos gang, or even *dated* him, it is difficult to comprehend why a photograph was so necessary for an identification.

2. Confirmation of Sirena's flight.

Bustillo also argues that the Honduran consulate would have provided confirmation that Sirena was on the flight to Honduras, in support of the testimony provided by Ulma Martinez. (Tr. 03/18/99 at 167-68). He then argues that this constitutes "powerful evidence, for the guilty 'flee when no man pursueth.'" (Pet. at 34) (citation omitted).[7]

This argument is unpersuasive. If Sirena was not only present at the crime scene but also running behind the petitioner, bat in hand, toward the victim, he was guilty as a principal in the second degree. *See Moehring*, 223 Va. at 567, 290 S.E.2d at 892; *Taylor*, 260 Va. at 687-688, 537 S.E.2d at 594. The police had stopped and questioned Julio Osorto on the night of the attack. Therefore, assuming Osorto and Sirena are one and the same, he had a compelling motive to flee—regardless of the petitioner's guilt. Further minimizing any prejudice along these lines and in addition to Martinez' testimony, Detective Cline confirmed that Sirena could not be found in the weeks following the attack. (Tr. 03/18/98 at 70-71). Amaya also said he had not seen Sirena since the assault. (Tr. 03/18/98 at 101-02). Finally, this tangential information, a photograph and confirmation of the flight, do not alter the fundamental evidence against the petitioner: three eyewitnesses, two of

---

[7] A more apposite Biblical text for this case would be Exodus 20:13: "Thou shalt not kill."

whom knew Bustillo, identified him in good light as the assailant.

CONCLUSION

This Court should deny the petition for appeal and should further dismiss assignments of error 1-5.

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 042023
CIRCUIT COURT NO. L201879

MARIO A. BUSTILLO,
APPELLANT,

AGAINST

GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
APPELLEE.

Monday, March 7, 2005

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner provided by law with regard to assignments of error nos. 1 through 5 because the appellant failed to file the habeas proceeding transcript(s), the Court dismisses the petition for appeal as to those assignments of error.

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of with regard to assignment of error no. 6. Accordingly, the Court refuses the petition for appeal as to that assignment of error.

Chief Justice Hassell took no part in the decision of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

/s/

Deputy Clerk

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

No. 05-51

Nov. 7, 2005

Motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari to the Supreme Court of Oregon in No. 04-10566 granted limited to Questions 1 and 2 presented by the petition. Petition for writ of certiorari to the Supreme Court of Virginia in No. 05-51 granted limited to Question 1 presented by the petition. These cases are consolidated and a total of one hour is allotted for oral argument.

(13)
No. 05-51

Supreme Court, U.S.
FILED
DEC 23 2005
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IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

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QUESTION PRESENTED

Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100–101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or on the ground that the treaty does not create individually enforceable rights.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the case in the Supreme Court of Virginia are named in the caption.

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BRIEF FOR PETITIONER MARIO A. BUSTILLO

OPINIONS BELOW

The decision of the Supreme Court of Virginia (J.A. 241-242) is unreported. The May 4, 2004, decision of the Fairfax County Circuit Court (J.A. 155-169) is unreported; the September 16, 2003, decision of the Fairfax County Circuit Court (J.A. 138-154) is reported at 63 Va. Cir. 125; the February 21, 2003, decision of the Fairfax County Circuit Court (J.A. 136-137) is unreported; and the August 8, 2002, decision of the Fairfax County Circuit Court (J.A. 120-131) is unreported.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 7, 2005. On May 25, 2005, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 5, 2005, and the petition was filed that day. The petition was granted, limited to Question 1, on November 7, 2005. 126 S. Ct. 621. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Relevant portions of the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2; Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101; and the Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1953, 21 U.S.T. 325, are set forth in the Appendix to the Petition for a Writ of Certiorari (Pet. App. 51a-55a) and the Appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

This case concerns whether a foreign national may seek judicial relief from a conviction obtained in violation of the Vienna Convention on Consular Relations ("Vienna Conven-

tion" or "Convention"), April 24, 1963, 21 U.S.T. 77, where the violation prevented him from presenting critical evidence supporting his claim of innocence at trial. The sole issue in petitioner Mario Bustillo's first-degree murder trial was *who* struck James Merry with a baseball bat on the evening of December 10, 1997. Three witnesses testified that Bustillo, a Honduran national, committed the crime. Two testified that Bustillo was not the killer, and one of them identified a Honduran national nicknamed "Sirena"—now known to be Julio Osorto—as the man who killed Merry. The day after Merry died, Sirena fled the country for Honduras. Since then, Sirena has admitted to friends, in surreptitiously videotaped conversations, that he was the one who killed Merry.

At the time of trial, however, defense counsel had difficulty proving that Sirena existed. As a result, the Commonwealth mocked the defense's theory that this "so-called Sirena" committed the crime; called Sirena's absence "convenient"; and questioned the credibility of a witness who swore she saw Sirena fleeing the country, on a flight to Honduras, the day after the victim's death. It now turns out that the Commonwealth failed to turn over to the defense police reports showing that the police stopped "Julio C. Osorto"—Sirena—near the crime scene shortly after the crime occurred; that Sirena had what appeared to be red "ketchup" stains on his shirt and pants; that Sirena gave three conflicting stories about where he was coming from; and that another witness reported seeing Sirena cock a baseball bat as he approached Merry.

More important, no one advised Bustillo of his right, under Article 36 of the Vienna Convention, to communicate with his consulate. The United States has conceded that Bustillo's Vienna Convention rights were violated and has apologized to Honduras. The Honduran Consulate has averred that, had it been advised of Bustillo's defense—that another Honduran national (Sirena) had committed the crime—at the very least it would have: (a) provided a photo-

graph of Sirena to prove his existence; (b) supplied immigration records showing that Sirena had entered Honduras the day after Merry died; and (c) attempted to contact and interview Sirena in Honduras.

The issues presented are whether, given the treaty violation and the evidence corroborating Bustillo's claim of innocence: (1) a foreign national may invoke the Vienna Convention as a basis for judicial relief from his conviction; and (2) the courts of this Nation must consider the impact of such a violation despite a failure to raise it at trial.

I. Treaty Background

The United States and more than 160 other countries (including Honduras) are signatories to the Vienna Convention. Article 36 of the Convention, entitled "Communication and contact with nationals of the sending State," obliges signatory Nations (a) to advise detained foreign nationals of their right to communicate with their consulate, and (b) to advise the consulate of the arrest promptly if the detainee so requests. It provides, among other things, that:

> [I]f [the detainee] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. * * * The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Vienna Convention art. 36(1)(b). Article 36 further specifies that the "laws and regulations of the receiving State," although generally applicable, "*must* enable *full effect* to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.* (emphasis added).

The United States also ratified the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325. The Optional Protocol provides, in relevant part, that "[d]isputes arising out of

the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice" ("ICJ"). *Ibid.* The United States first invoked the Optional Protocol in 1979, claiming that Iran had violated Article 36 of the Vienna Convention in connection with the seizure of the United States Embassy in Tehran. See *United States Diplomatic and Consular Staff in Tehran (U.S.* v. *Iran)*, 1979 I.C.J. 23 (Dec. 15).

Since then, the ICJ has twice been called upon to address the meaning and effect of Article 36 in cases involving the United States. See *LaGrand Case (F.R.G.* v. *U.S.)*, 2001 I.C.J. 466 (June 27); *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 12 (Mar. 31). In both cases, the ICJ held that Article 36 provides foreign nationals with individual rights of consular notification and contact that can be asserted in the courts of the detaining country. *LaGrand*, 2001 I.C.J. at 497, ¶ 89; *Avena*, 2004 I.C.J. at 66, ¶ 140. The ICJ also held that procedural bars against assertion of Vienna Convention rights are inconsistent with the Convention if they preclude meaningful consideration of otherwise valid claims. *LaGrand*, 2001 I.C.J. at 497, ¶ 90; *Avena* 2004 I.C.J. at 57, ¶ 113.

II. Proceedings In This Case

A. The Murder Of James Merry

James Merry was murdered on the night of December 10, 1997, as he smoked a cigarette outside the Popeye's restaurant in Springfield, Virginia. Someone approached Merry and struck him in the head with a baseball bat; Merry eventually died of his wound. Immediately after the attack, the 15 to 20 youths in and around the Popeye's restaurant scattered. 3/17/98 Tr. at 128, 219, 238. When police arrived on the scene at about 8:30 p.m., they found Merry lying "down on the ground outside" the Popeye's, "bleeding." *Id.* at 116 (Officer Milam); see *id.* at 133, 139 (Michelle Gutierrez); *id.* at 223 (Jesse Konstanty). "[T]he evidence also showed that there was blood at the scene,

including photographic evidence of what appeared to be" drops of "blood spatter." J.A. 147 (footnote omitted). When interviewed on the scene, a witness who had been sitting inside the Popeye's restaurant asserted that Bustillo had been the killer; others agreed.

Bustillo and other witnesses maintain that another Honduran national—"Sirena," now known to be "Julio Osorto" —committed the murder. It turns out that, shortly after the murder, the police actually encountered Sirena while canvassing the area around the crime scene. The Report of Officer Christopher Mahoney indicates that he stopped Sirena, who "had what appeared to be ketchup" on his shirt and pants. J.A. 134. Sirena gave conflicting statements about where he was coming from:

> [Mr. Osorto] claimed he had come from McDonald's * * *. Mr. Osorto originally stated he was coming from his cousin[']s residence on Cumberland Ave., then he stated he was coming from Commerce St. * * *. He stated he lived at Chelsea Square Apts. but was confused on the address.

J.A. 134-135. Sirena denied that he had been at Popeye's that evening. J.A. 135. According to the report, Sirena's breath smelled of alcohol. J.A. 135. Officer Mahoney did not detain Sirena for further questioning; Sirena's picture was not shown to witnesses; and the report of the encounter was not disclosed to the defense until four years after trial.

Several hours after encountering Sirena near the crime scene, officers gathered several witnesses at the police station. 3/18/98 Tr. at 39. Between 3:00 a.m. and 4:00 a.m., Detective Richard Cline showed six photographs to witnesses Michelle Gutierrez and Jesse Konstanty. *Id.* at 39-41, 165-168. The array included Bustillo's photograph, but it did not include Sirena or any other person present when the attack occurred. *Id.* at 54-56. Gutierrez and Konstanty, who knew Bustillo, identified Bustillo as the assailant. *Id.* at 41. Bustillo was arrested that morning at his high school. *Id.* at 68. Although Bustillo told officers that he is a Hon-

duran national, he was not notified of his right under the Vienna Convention to consult with the Honduran Consulate; nor were Honduran officials advised of his arrest.

Around January 7, 1998, Detective Cline interviewed eyewitness Jose Armando Amaya. According to Cline's notes, Jose Amaya saw both Sirena and Bustillo at the Popeye's restaurant that evening. Although he "[c]ouldn't tell who actually hit the guy," Jose Amaya said he "[s]aw Sirena take [a] bat from [his] shirt" and "cock it." Notes of Det. Richard Cline, Jan. 7, 1998, at 1 ("Det. Cline Notes"); J.A. 140 n.6 ("Amaya observed 'Sirena' at the scene with a 'bat cocked.'"). Amaya said that Sirena had lived in the Chelsea Square Apartments, the same complex identified by Sirena when Officer Mahoney stopped him the night of the murder. Det. Cline Notes at 4. Amaya also stated that Sirena left the Northern Virginia area by December 31, 1997. *Ibid.* Like the Mahoney Report, the Cline notes were not disclosed until years after the trial.[1]

B. The Trial And Direct Review

Bustillo's first-degree murder trial began on March 17, 1998. The sole issue at trial was *who*—Bustillo or Sirena—swung the bat that killed James Merry. There was no physical evidence connecting Bustillo to the crime. The prosecution therefore relied on the testimony of three eyewitnesses (Michelle Gutierrez, Jesse Konstanty, and Valeria Landaeta) who claimed that they saw the attack from inside the Popeye's restaurant. They admitted that the attack lasted only seconds and that, although the attack occurred outside the restaurant after dark, their observations were

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[1] Although Bustillo's trial counsel reminded the prosecution of its obligation to disclose exculpatory material, 12/29/97 Tr. at 5, the prosecution did not disclose Officer Mahoney's report. The Commonwealth did disclose that Jose Amaya had "told law enforcement that he saw [Bustillo] and Sirena at the scene and both had bats," J.A. 25, but it did not include Detective Cline's notes; nor did it mention that Amaya reported seeing Sirena with his "bat cocked." J.A. 140 n.6, 146.

made from within the well-lighted restaurant, through a glass window that was partially obstructed by an advertising poster. 3/17/98 Tr. at 127-128, 131, 142, 157, 161, 222, 241-242, 249, 251; 3/18/98 Tr. at 20, 25, 27-28, 30. They also admitted that, before talking to the police, they had discussed with each other who they thought the attacker had been. 3/17/98 Tr. at 252-253; 3/18/98 Tr. at 31-32. They ultimately identified Bustillo as the assailant, relying in part on their belief that he was wearing a red shirt. 3/17/98 Tr. at 132-133, 222; 3/18/98 Tr. at 30. Detective Cline testified that no one he interviewed identified anyone other than Bustillo as the attacker. 3/18/98 Tr. at 69.

Bustillo presented the testimony of two eyewitnesses who were standing outside the restaurant, only steps away from Merry, when the attack occurred. Amilcar Amaya testified that he was just leaving the Popeye's when he saw Sirena approach Merry, take out a baseball bat, and strike Merry in the head. 3/18/98 Tr. at 100-101. Christina Hondoy testified that, shortly before the attack on Merry, she had stepped out of the Popeye's with a friend to smoke a cigarette. *Id.* at 141-142. She had turned to speak with Merry when she saw someone strike him in the head with a baseball bat. *Id.* at 142. She stated that, although she did not recognize the assailant, she knew that it was not Bustillo. *Ibid.* Hondoy further testified that, a few weeks after the attack (after a preliminary hearing), she told Detective Cline that the person she saw at the hearing, Mario Bustillo, was not the person who struck Merry. *Id.* at 143, 191. According to Hondoy, Cline told her "[not to] worry" and that she would not be needed at trial. *Ibid.*

Ulma Martinez testified that, the day after Merry died, she saw Sirena on a flight to Honduras. 3/18/98 Tr. at 167-168. On cross-examination, Martinez admitted that she did not know Sirena's last name. *Id.* at 171. Two of Bustillo's high school teachers testified that Bustillo's demeanor the day after the assault was inconsistent with his having committed murder the night before. *Id.* at 115-118, 132-135.

In closing argument, the prosecution disparaged Bustillo's defense that Sirena committed the murder. J.A. 21-22. The prosecutor dismissed Amilcar Amaya as a "gang member," 3/19/98 Tr. at 19-20; Christina Hondoy, the prosecutor also argued, had been given loans by the Bustillo family, *id.* at 21-23. "This whole Sirena thing," the prosecutor mocked, was very "convenient" because "Sirena apparently isn't available." J.A. 21. Referring to "this so-called Sirena," the prosecution pointed out that neither Amilcar Amaya (who testified that he saw Sirena strike James Merry), nor Ulma Martinez (whom the prosecutor characterized as having supposedly seen Sirena flee to Honduras the day after Merry's death) "kn[e]w his full name." J.A. 22. And the prosecutor pointed out that no one produced "plane tickets * * * for this Sirena." J.A. 22.

The jury was never informed that Officer Mahoney had stopped Sirena while canvassing the area around the crime scene; that Sirena had red stains on his shirt and pants; that Sirena gave inconsistent statements about where he had been; and that Sirena lied about being at the Popeye's that evening. Neither the jury (nor any of the witnesses) saw a picture of Sirena, possessed by Honduran officials, that proved his existence and could have been used when examining witnesses about the assailant. And the jury never heard that Honduras's immigration records demonstrated that Sirena in fact had fled to Honduras the day after Merry died—precisely as Ulma Martinez had testified.

The jury convicted Bustillo of first-degree murder and sentenced him to 30 years' imprisonment. 3/20/98 Tr. at 24.

With new counsel, Bustillo filed an appeal. While the appeal was pending, Bustillo's counsel learned that Bustillo had never been advised of his right to consult with consular officers. He also obtained a declaration from the Honduran Consulate stating that, had it been informed of the charges against Bustillo, it would have provided him with assistance. J.A. 32, 73-74. Bustillo moved to remand the case to the trial court to, among other things, further develop the

record, but the motion was denied. *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 & 2422-98-4, slip op. at 13-14 (Va. Ct. App. June 1, 1999). The court of appeals then affirmed the conviction. *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 and 2422-98-4, 2000 WL 365930 at *3, (Va. Ct. App. Apr. 11, 2000). The Supreme Court of Virginia denied Bustillo's petition for appeal, *Bustillo* v. *Commonwealth*, No. 001110, slip op. at 1 (Va. Jan. 17, 2001), and this Court denied his petition for a writ of certiorari, *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

C. State Habeas Proceedings

Bustillo then sought a writ of habeas corpus in the Circuit Court for Fairfax County. The petition sought a new trial based on the violation of Bustillo's rights under Article 36 of the Vienna Convention, newly discovered evidence, and violations of the duty to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

1. A key component of the petition was a surreptitiously recorded videotape in which Sirena admitted killing Merry. See J.A. 33-55. On the tape—recorded by another Honduran national in Honduras—Sirena brags about the killing in terms that are nothing short of chilling: "When I smashed [Merry] with that blow * * * I heard that son of a bitch sound like a big box." J.A. 40. Consistent with the witness testimony, Sirena specified that he attacked Merry with a baseball bat while Merry was outside the Popeye's smoking a cigarette. J.A. 38. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been "wearing a red sweater." J.A. 41. Sirena also stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. J.A. 40-41.

Sirena also acknowledged that Bustillo had been wrongly convicted. Upon entering the home of the "friend" who recorded his admissions, Sirena warned that his "friend" better not try to help Bustillo:

> [Sirena]: But you know that guy's family, *man*. And I hope you're not snitching, son of a bitch.
>
> [Friend]: No, *man*. I just know them, but you're my friend. [Bustillo] was just an acquaintance, *man*.
>
> [Sirena]: But I don't fucking care, *man*. *That guy must be paying for something he did before.*
>
> [Friend]: No, but I still feel bad about it. You know well that he didn't do it. That's why I feel bad, homes.
>
> [Sirena]: I don't know. I don't think those guys burned me. *Because, if they had burned me they would have let that guy go.*

J.A. 54 (some emphasis added). The habeas petition included the videotape, together with the affidavits of four eyewitnesses who swore that, upon viewing the videotape, they "recognized the individual facing the camera" (Sirena) as the person they saw "committing the December 10, 1997, assault" on Merry. J.A. 56-59.

Bustillo also asserted that, had he been apprised of his rights under Article 36 of the Vienna Convention, he would have sought assistance from the Honduran Consulate. J.A. 60. The Honduran Consulate in turn averred that, had it been apprised of the case, it would have (at a minimum) confirmed Julio Osorto/Sirena's existence and nationality; provided official records of his arrival in Honduras just after Merry's death; provided a picture of him; and attempted to locate and interview him. J.A. 32, 73-74.

Using the picture of Sirena provided by the Honduran Consulate, Bustillo's counsel interviewed a number of witnesses to the crime. No fewer than five witnesses executed affidavits stating that, upon seeing the photograph of Sirena provided by Honduras, they recognized Sirena as the individual who attacked Merry. J.A. 61, 65, 98, 100, 106. Some explained that witnesses had not come forward earlier because they feared being deported. J.A. 61, 65.

Finally, Bustillo asserted that the prosecution had unlawfully withheld exculpatory evidence in violation of *Brady*

v. *Maryland*. In response to a motion to compel, the Commonwealth for the first time disclosed the police report of Officer Christopher Mahoney and the investigation notes of Detective Richard Cline. The Mahoney Report revealed that Officer Mahoney stopped "Julio C. Osorto" (Sirena) while canvassing the crime scene hours after the fatal assault; that Sirena "had what appeared to be ketchup" on his shirt and pants; and that Sirena gave conflicting statements about where he was coming from. J.A. 134-135. Detective Cline's investigation notes recorded that eyewitness Jose Amaya "[s]aw Sirena take [a] bat from [his] shirt" and "cock it" as he approached Merry. Det. Cline Notes at 3.

2. On August 8, 2002, the Circuit Court denied Bustillo's new evidence and Vienna Convention claims. The court held that new evidence is not a ground for habeas relief, J.A. 123, and that the Vienna Convention claim was procedurally barred for failure to raise it earlier, J.A. 129.

The Circuit Court did hold that the Mahoney Report and Detective Cline's notes were exculpatory and should have been turned over to the defense. Those documents "unquestionably implicate 'Sirena' * * * as a possible suspect," and thus "must be deemed exculpatory" within the meaning of *Brady*. J.A. 146, 147. The notes "not only make[] clear that Sirena was present at the scene, but also implicate[] Sirena as the actual assailant." J.A. 146. The fact that Sirena "was stopped by an officer on the night of the assault near the crime scene with red stains on his clothing" was also clearly relevant given that "photographs of the crime scene depict[] what appears to be blood spatter." J.A. 146-147; see J.A. 144 ("Merry's blood was found at the scene.").

Following a hearing on "materiality," however, the Circuit Court ruled that the withheld police reports were not material. J.A. 167. The court downplayed the red stains on Sirena's clothing, and it did not address the fact that Sirena, when stopped by the police near the crime scene, had lied about where he was coming from. J.A. 165-166.

3. On March 7, 2005, the Virginia Supreme Court denied Bustillo's petition for appeal. In a two-paragraph order, the court stated that it found "no reversible error" with respect to the circuit court's rejection of Bustillo's Vienna Convention claim. J.A. 241. The court dismissed Bustillo's *Brady* on procedural grounds. J.A. 241; Pet. 13.

4. On November 7, 2005, this Court granted the petition for a writ of certiorari, limited to the Vienna Convention issues. J.A. 243.

SUMMARY OF ARGUMENT

I. A. The Supremacy Clause of the Constitution makes treaties—no less than the Constitution and Acts of Congress—the "supreme Law of the Land." The Framers' decision to make treaties binding federal law was born of experience. The Articles of Confederation had proved unworkable in part because they did not obligate the States and their courts to obey treaty obligations, denying the central government of means to secure compliance. Because the Vienna Convention is self-executing, individual parties may invoke its protections in judicial proceedings to the extent the Convention creates individual rights.

B. The text, structure, and origins of Article 36 make it clear that the Convention's notification and consular access provisions accord individual rights to detained foreign nationals. By its terms, Article 36 creates "rights" and "freedoms" that "shall" be respected, words that are customarily associated with the creation of individual rights. The text of Article 36 shows that the treaty's drafters understood the difference between the rights of signatory nations and the rights of individual foreign nationals, and that they intended to create both. Subsection 1(a), for example, first grants nations (acting through consular officers) the rights "to communicate with" and "to have access to" their nationals; it then provides that those "[n]ationals * * * shall have the same freedom with respect to communication with and access to consular officials." Furthermore, Subsection

1(b) requires the receiving State to notify the foreign national of "*his* rights."

The Vienna Convention's drafting history confirms that the delegates to the Vienna Convention expressly considered whether Article 36 should create individual rights—as opposed to nation-to-nation rights—and decided that it should. That conclusion is bolstered by the United States' post-ratification conduct. Other signatories agree that the Convention creates individual rights, and the International Court of Justice—which has jurisdiction to interpret the Vienna Convention—has twice so held. The preamble to the Convention is not to the contrary. It cannot create ambiguity that does not exist. Moreover, it merely clarifies that the "privileges and immunities" the Convention grants consular officers are intended to facilitate their official duties. The preamble does not speak to the "rights" and "freedoms" Article 36 grants to detained foreign nationals.

II. A. The Vienna Convention permits signatories to effectuate the Convention through domestic law, but provides that "said laws and regulations *must enable full effect to be given* to the purposes for which the rights accorded under this Article are intended." Virginia's invocation of a procedural bar to preclude Bustillo from challenging his conviction on collateral review, because he did not raise the Vienna Convention violation at trial, fails to give those rights "full effect." First, the reason Bustillo did not consult and obtain the assistance of the Honduran Consulate—which had access to evidence supporting Bustillo's claim that another Honduran national committed the crime—was the Commonwealth's breach of its treaty obligation to advise Bustillo that he had the right to communicate with his consulate. The Commonwealth should not be permitted to parlay a consequence of its treaty violation into a reason for ignoring the violation. Second, procedural default rests on the presumption that the individual and counsel are aware of his rights and are best positioned to decide which arguments to raise. The Vienna Convention, however,

presumes that the individual is unaware of his treaty rights; for that very reason, it requires the State to inform foreign detainees of their rights to consular notification and assistance. The fact that the individual has a lawyer is immaterial under the Convention—Article 36 does not permit the State to transfer its responsibility to notify the detained national to defense counsel, and then penalize the national if his counsel fails to do so.

B. The imposition of procedural bars is particularly problematic in cases where, as here, the consulate would have provided evidence of the accused's innocence. This Court has recognized that traditional procedural default rules do not apply where the defendant has not had a meaningful opportunity to develop the factual predicate of his claim. For that reason, ineffective assistance of counsel and *Brady* claims generally can be brought on collateral review. In those contexts, the defendant does not have a sufficient opportunity to assert the violation in the trial court because he is ignorant of the violation, or because proceedings on direct review do not permit the development of a sufficient record of the violation and its impact.

For the same reasons, foreign nationals must be permitted to raise Vienna Convention claims after trial. Often, the State's violation will keep them ignorant of their treaty rights until after trial. Moreover, foreign nationals cannot develop a record of the assistance their consulate could have provided until they receive notice of their rights and have an opportunity to discuss their cases with consular officials. Requiring foreign nationals to raise Vienna Convention claims before they can develop that record forces foreign nationals to raise the claims prematurely, before they can determine whether the claims have merit. More important, those premature claims often will be denied because the record is inadequate to establish an entitlement to relief, including claims that would ultimately have proved meritorious on a full record. The ICJ has twice concluded that precluding Vienna Convention claims on collateral

review because of procedural bars fails to give "full effect" to Vienna Convention rights. That view is entitled to this Court's "respectful consideration."

C. Barring the claim here, moreover, is inconsistent with the criminal justice system's central goal—convicting the guilty and acquitting the innocent. In this case, the jury never heard critical evidence showing that Bustillo did not commit the offense. The trial turned on closely divided eyewitness testimony as to which of two Honduran nationals—Bustillo or Sirena—swung the fatal blow, but the defense could not even prove Sirena's existence. Absent the Vienna Convention violation, the Honduran Consulate would have provided Bustillo with Sirena's photograph and immigration records. Those materials would not merely have established Sirena's existence. They also would have allowed the defense to test the vulnerable recollections of the prosecution's witnesses. When shown Sirena's photograph or a videotape of him, nine eyewitnesses said they recognized him as the person who struck Merry. The immigration records, moreover, would have conclusively established that Sirena fled to Honduras the day after the victim died. They also would have provided his full name, enabling counsel to seek specific evidence about "Julio C. Osorto" (Sirena), including evidence of his suspicious conduct when stopped by police, with red stains on his clothes, near the crime scene on the night of the murder. Finally, the Honduran government has averred that it would have attempted to locate and interview Sirena. After Bustillo's habeas counsel tracked Sirena down in Honduras, he obtained a surreptitiously recorded videotape on which Sirena, while discussing the incident with his "friends," bragged about committing the murder in chilling (and self-authenticating) detail.

ARGUMENT

I. Article 36 Of The Vienna Convention Creates Individual Rights That Are Judicially Enforceable

A. The Supremacy Clause Makes Treaties, Including The Vienna Convention, Binding And Enforceable Federal Law

The Supremacy Clause of the Constitution makes treaties—no less than the Constitution and Acts of Congress—the supreme Law of the Land, binding on the States and their courts alike:

> The Constitution, and the Laws of the United States * * * and *all Treaties made* * * * under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

The Framer's decision to make treaties "supreme Law," along with the Constitution and Acts of Congress, was born of practical experience. Although the Articles of Confederation had given Congress exclusive authority to "enter[] into treaties and alliances," they did not expressly bind the States and their courts to obey those accords. See Articles of Confederation arts. 6, 9. As a result, when a State violated treaty obligations, the national government could not "punish that State, or compel its obedience to the treaty." 1 The Records of the Federal Convention of 1787, at 24-25 (Max Farrand ed., rev. ed. 1966) ("Farrand") (statement of Edmund Randolph). That created serious problems. As James Madison lamented, experience revealed "a constant tendency in the States * * * to violate national Treaties," *id.* at 164, destroying the Nation's credibility abroad and with it the ability to negotiate new international accords. 3 Farrand, *supra*, at 548 (statement of James Madison) ("[T]he Fed[eral] auth[orit]y had ceased to be respected abroad" due to the States' treaty violations); The Federalist No. 64,

at 394 (John Jay) (Clinton Rossiter ed., 1961) ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.").

The central government's inability to compel State compliance became one of "the principal animating causes of the Framers' decision to establish a new government under the Constitution." Carlos M. Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1102 (1992). By expressly making treaties part of our domestic law—and the "supreme Law of the Land"—the Framers ensured that *individuals* could obtain judicial enforcement of treaty rights. As Alexander Hamilton explained:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, *as far as respects individuals*, must, like all other laws, be ascertained by judicial determinations.

The Federalist No. 22, at 150 (Clinton Rossiter ed., 1961) (emphasis added).[2]

Thus, by the Framers' design, treaties have a dual character. As a matter of *international law*, treaties are "a compact between independent nations," enforceable by the Executive Branch in the international arena through "international negotiations and reclamations." *Edye* v. *Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884); see *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1779 (2005);

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[2] James Wilson similarly observed that the provision for judicial power in Article III over cases arising under treaties "will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 490 (Jonathan Elliott ed., 2d ed. 1881).

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In addition, as a matter of *constitutional law*, the Supremacy Clause makes each treaty as much "the law of the land as an act of congress is." *Head Money Cases*, 112 U.S. at 598. Consequently, "whenever [a treaty's] provisions prescribe a rule by which the rights of the private citizen or subject may be determined[, and] when such rights are of a nature to be enforced in a court of justice, [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.* at 598-599.

For more than two centuries, this Court has consistently provided for judicial enforcement of treaties creating individual rights.[3] The Court even has refused to close the court-

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[3] See, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961) (enforcing Yugoslavian citizens' treaty rights to inherit personal property in the United States, despite contrary Oregon law); *Warren* v. *United States*, 340 U.S. 523 (1951) (allowing seaman to sue for injuries under terms of treaty); *Clark* v. *Allen*, 331 U.S. 503 (1947) (enforcing treaty rights of German citizens to inherit United States realty); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) (enforcing treaty right of Danish citizen to be free from discriminatory state tax); *Jordan* v. *Tashiro*, 278 U.S. 123 (1928) (affirming mandamus to enforce treaty rights of Japanese citizens to organize corporation); *Cheung Sum Shee* v. *Nagle*, 268 U.S. 336 (1925) (holding that treaty prevented mandatory exclusion of wives and children of Chinese merchants); *Asakura* v. *Seattle*, 265 U.S. 332 (1924) (invoking treaty to enjoin law prohibiting foreign citizens from serving as pawnbrokers where treaty protected Japanese citizen's right to carry on a trade); *Johnson* v. *Browne*, 205 U.S. 309 (1907) (affirming grant of habeas corpus where Canadian defendant had been convicted in violation of extradition treaty); *de Geofroy* v. *Riggs*, 133 U.S. 258 (1890) (enforcing treaty right of French citizen to hold real estate in the United States); *United States* v. *Rauscher*, 119 U.S. 407 (1886) (prosecution of British citizen barred where he was extradited in violation of treaty); *Chew Heong* v. *United States*, 112 U.S. 536 (1884) (reversing denial of habeas petition of Chinese laborer detained in violation of immigration treaty with China); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1879) (enforcing property rights of Swiss citizens under treaty against Virginia "inquisition of escheat"); *Chirac* v. *Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (enforcing treaty that "enabled the subjects of France to hold lands in

house doors to individuals when the treaty in question explicitly provides a mechanism for diplomatic resolution of violations. See *United States* v. *Jung Ah Lung*, 124 U.S. 621, 632-633 (1888).[4] The Supremacy Clause thus provides "a complete answer to the proposition that the rights of persons [under a treaty] cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress." *United States* v. *Rauscher*, 119 U.S. 407, 431 (1886).

There is a category of treaties—treaties that are not "self-executing"—that do *not* form part of our domestic law, absent implementing legislation. See *Foster* v. *Neilson*, 27

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the United States" in inheritance dispute); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) (enforcing treaty rights of British citizens to defeat Virginia forfeiture); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (enforcing treaty protecting British creditor against cancellation of debt by Virginia). Other cases in which this Court has enforced treaties on behalf of private interests include *Bacardi Corp.* v. *Domenech*, 311 U.S. 150 (1940) (enjoining Puerto Rico from enforcing statute against United States corporation in violation of treaty); *Cook* v. *United States*, 288 U.S. 102 (1933) (disallowing forfeiture of British merchant vessel seized in violation of treaty); and *Soc'y for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 21 U.S. (8 Wheat.) 464 (1823) (enforcing treaty rights of British corporation to defeat action in ejectment).

[4] In *Jung Ah Lung*, a Chinese citizen who had been detained and denied re-entry into the United States sought a writ of habeas corpus, claiming rights under an Act of Congress that implemented the terms of a treaty between the United States and China. 124 U.S. at 623, 626-627. The government argued that the petitioner was prohibited from raising his claim on habeas because "the treaty itself contemplates only executive action," citing a provision under which the "Chinese minister at Washington may bring the matter to the notice of the secretary of state of the United States, who will consider the subject with him." *Id.* at 632-633. This Court held that the petitioner could raise his claim on habeas nonetheless, finding that "there is nothing in this provision which excludes judicial cognizance, or which confines the remedy of a subject of China * * * to diplomatic action." *Id.* at 633.

U.S. (2 Pet.) 253, 314 (1829).[5] There is no dispute, however, that the Vienna Convention is self-executing and therefore "the supreme Law of the Land."[6] Consequently, to the extent the Convention "affects the rights of parties litigating in court," it "as much binds those rights and is as much to be regarded by the court as an act of congress." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); see also *United States* v. *Alvarez-Machain*, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if * * * it is self-executing, it would appear that a court must enforce it on behalf of an individual.").

B. Article 36 Of The Vienna Convention Creates Individual Rights

Because the Vienna Convention is self-executing, it "stands on the same footing of supremacy as do the provi-

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[5] In *Foster*, this Court recognized that a treaty is judicially enforceable only if it "operates of itself without the aid of any legislative provision," *i.e.*, only if it is self-executing. Treaties that merely obligate the United States to *enact legislation* (addressing themselves "to the political * * * department") are not self-executing. *Id.* at 314-315. By contrast, if "the treaty contains stipulations which are self-executing, *that is, require no legislation to make them operative*, to that extent they have the force and effect of legislative enactment." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888) (emphasis added). A non-self-executing treaty does "not itself create obligations enforceable in the federal courts," though it "bind[s] the United States as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004).

[6] During the Senate hearings, a State Department official testified that the Vienna Convention was "entirely self-executive and does not require any implementing or complementing legislation." S. Exec. Rep. No. 91-9, App. p. 5 (1969). The United States has acceded to "the accepted understanding that the Vienna Convention is self-executing." U.S. Br. as *Amicus Curiae* at 26, *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005). And the State Department has long adhered to that position. United States Dep't Of State, Consular Notification And Access 44 (avail. at http://travel.state.gov/pdf/CNA_book.pdf) ("Implementing legislation is not necessary (and the VCCR [is] * * * 'self-executing') because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers.").

sions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." *Asakura* v. *Seattle*, 265 U.S. 332, 341 (1924). The question therefore becomes whether the Convention may be invoked by individual foreign nationals detained in the United States—or whether instead it may be invoked only by the signatory nations. That question is strictly a matter of interpreting the Vienna Convention. The inquiry "must begin * * * with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 396-397 (1985). The Court has also "traditionally considered as aids to interpretation the negotiating and drafting history (*travaux préparatoires*) and the post-ratification understanding of the contracting parties." *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

In *Breard* v. *Greene*, 523 U.S. 371, 376 (1998), this Court observed that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest." In view of Article 36's text, its *travaux préparatoires*, the parties' post-ratification conduct, and the intervening decisions of the international judicial body responsible for the Convention's construction, it is no longer merely "arguable" that Article 36 creates individual rights. It is now clear that Article 36 creates such rights.

1. *The Text Of Article 36 Unambiguously Defines The Rights Of Individuals*

In determining whether Article 36 creates individual rights, "the clear import of [the] treaty language controls." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). Article 36 by its terms imposes mandatory—not hortatory—obligations on signatories. It imposes obligations with respect to identified individuals (detained foreign nationals). And it expressly denominates many of those obligations as the "rights" and "freedoms" *of the detained individuals.* A clearer basis for concluding that the treaty creates individual rights could scarcely be imagined.

Subsection (1)(a) of Article 36 begins by establishing a right of communication and access *for the signatory nations*: "*[C]onsular officers* shall be free to communicate with [detained] nationals * * * and to have access to them." Vienna Convention art. 36(1)(a) (emphasis added). The second clause of subsection (1)(a), however, establishes that the *detained individual* has a corresponding right: Detained foreign "[n]ationals," it declares, "shall have the same freedom." *Ibid.* Indeed, the *sole purpose* of the second clause is to designate the individual national as an additional beneficiary of the "same freedom" given to signatory nations in the first clause. A contrary interpretation—under which Article 36 would *not* create individual rights—would render the second clause superfluous, violating the "cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000).

The text of subsection (1)(b) likewise bestows rights on both individual detainees and signatory nations. First, that subsection commands that, if the detained person so "requests," "competent authorities of the [detaining] State shall, without delay, inform the [foreign national's] consular post." Vienna Convention art. 36(1)(b). Second, subsection (1)(b) mandates that "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded to the said authorities without delay." *Ibid.* Third (and most critically), subsection (1)(b) requires authorities in the detaining State to "inform the person concerned without delay of *his rights under this sub-paragraph*." *Ibid.* (emphasis added). The Convention's use of the phrase "his rights" makes it clear that the subparagraph creates *rights*—and that the rights belong to the detained individual. See *Medellín* v. *Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) ("[I]f a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be

required before a defendant could invoke that statute to complain in court if he had not been so informed."); *United States* v. *Li*, 206 F.3d 56, 72 (1st Cir. 2000) (Torruella, J., concurring and dissenting) ("I have some difficulty envisioning how it is possible to frame language that more unequivocally establishes that the protections of Article 36(1)(b) belong to the individual national.").

The mechanics of subsection (1)(b) also compel the conclusion that it creates rights in the individual and not merely the signatory nation. Consular notification is not automatic—the detaining authority must contact the foreign national's consulate only "if [the detainee] so requests." Vienna Convention art. 36(1)(b). By giving the detained individual the decision to have his consulate notified or not, the Convention makes it clear that the right to notification resides with him, not his country of origin.

Finally, section (2) expressly forecloses any argument that the Vienna Convention creates only nation-to-nation rights that may be enforced only through international diplomacy. That section clearly contemplates domestic judicial consideration of an individual national's claim that his rights were violated, declaring that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention art. 36(2).

In sum, the plain "text [of Article 36] emphasizes that the right of consular notice and assistance is the citizen's." *Breard* v. *Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); see also *Jogi* v. *Voges*, 425 F.3d 367, 382 (7th Cir. 2005) ("[W]e conclude that even though many if not most parts of the Vienna Convention address only state-to-state matters, Article 36 confers individual rights on detained nationals."). "This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect." *Kolovrat* v. *Oregon*, 366 U.S. 187, 193 (1961). It should do likewise here.

2. *The* Travaux Préparatoires *Confirm That Article 36 Creates Individual Rights*

The Vienna Convention's negotiating history—its *travaux préparatoires*—confirm what Article 36's text makes clear: that the signatories unmistakably understood Article 36 to create rights in individual, detained foreign nationals. Indeed, the issue was specifically debated; the United States delegation strongly advocated the protection of *individual rights* in Article 36; and the final version of the Convention, as a result, included such protections.

The original draft of Article 36, prepared by the International Law Commission ("ILC") for Conference delegates, provided in relevant part:

> (a) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the consular officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;
>
> (b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay[.]

2 U.N. Conference on Consular Relations: Official Records ("U.N. Official Records"), at 24, U.N. Doc. A/Conf.25/16, U.N. Sales No. 63.X.2 (1963).

Specifically raising the issue of individual rights, Venezuela objected to that language on the ground that "[t]he opening statement of sub-paragraph (1)(a), concerning *the right of the nationals* of the sending State to communicate with and have access to the competent consulate, was inappropriate in a convention on consular relations." 1 U.N. Official Records, *supra*, at 331, ¶ 32 (emphasis added). The

Venezuelan delegate proposed an amendment that would have eliminated all reference to the rights of individual nationals. *Ibid.*; 2 U.N. Official Records, *supra*, at 84. The Kuwaiti delegate shared Venezuela's objection, claiming that the ILC's "text introduced a novelty to the convention by *defining the rights of the nationals* of the sending States and *not* * * * *the rights of consular officials.*" 1 U.N. Official Records, *supra*, at 332, ¶ 37 (emphasis added).

Other delegates, however, argued that the text of (1)(a) did not go far enough in protecting the rights of individuals. The Australian delegate proposed that the signatory nation's "right [of communication and access] must be qualified with regard to the wishes of the individual. * * * There was no need to stress the extreme importance of not disregarding, in the present or any other international document, *the rights of the individual.*" 1 U.N. Official Records, *supra*, at 331, ¶ 34 (emphasis added). Venezuela ultimately withdrew its amendment and submitted a new one that retained the reference to the rights of individuals, but changed the order of the original text. *Id.* at 334, ¶ 2. The amendment was adopted. *Id.* at 336, ¶ 22.

The debate over individual rights continued in the discussion of subsection (1)(b). The ILC's original draft of that subsection provided for mandatory notification to the consulate of the sending nation whenever one of its nationals was detained; it made no mention of the rights of the individual. 2 U.N. Official Records, *supra*, at 24. The United States delegate proposed an amendment to (1)(b) that would make notification of the consulate contingent on "the request of a national of the sending State." 1 U.N. Official Records, *supra*, at 337, ¶ 39. The United States delegate explained that the "object of the amendment was *to protect the rights of the national concerned.*" *Ibid.* (emphasis added). The Korean delegate agreed, explaining that "paragraph (1)(b) was extremely important, because it related to one of the fundamental and indispensable *rights of the individual.*" *Id.* at 338, ¶ 11 (emphasis added). Delegates

from other countries objected to qualifying the nation's right to receive notification, see, *e.g.*, *id.* at 341, ¶ 33, and the amendment was temporarily defeated, *id.* at 342, ¶ 47.

Debate continued in the plenary meetings, and the question of individual rights remained a central focus.[7] The United States adhered to its view that Article 36(1)(b) should "recognize the *freedom of action of the detained persons* who might not wish their consulate to be informed" of their detention. 1 U.N. Official Records, *supra*, at 38, ¶ 21 (emphasis added). Consistent with the United States' position, the United Kingdom eventually proposed amending Article 36(1)(b) to provide that a detained foreign national be informed "without delay of *his rights* under subparagraph (b)," and that the detaining authority should notify the detained foreign national's consulate only "if he so requests." *Id.* at 83-84, ¶¶ 73, 74 (emphasis added). The amendment was adopted, *id.* at 86-87, ¶ 108, and remains unchanged in Article 36 today.

Thus, "[o]nly after much debate"—much of it focused on the issue of individual rights—"was the Conference able to agree on a text for Article 36." Report of the United States Delegation to the Conference on Consular Relations ("U.S. Delegation Report"), S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 59. But, as the U.S. Delegation Report observed, the resulting text of Article 36 was clear in

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[7] See, *e.g.*, 1 U.N. Official Records, *supra*, at 37, ¶ 13 (statement of Soviet delegate) ("What guarantee was there that the person concerned had been informed of *his right* [to consular notification] * * * ?") (emphasis added); *id.* at 37, ¶ 16 (statement of Vietnamese delegate) ("[I]t was a matter of reconciling the interests of two equal sovereign States * * * with respect for the *rights of the detained person.*") (emphasis added); *id.* at 81, ¶ 46 (statement of Indian delegate) (espousing the view that Article 36 "dealt with *the right of nationals of the sending State* to communicate with and to have access to their consulate") (emphasis added); *id.* at 85, ¶ 84 (statement of Tunisian delegate) (objecting to amendment to Article 36 on the ground that it would "frustrate the *national's right* to protection from his consulate") (emphasis added).

requiring "authorities of the receiving State to inform the person detained of *his right* to have the fact of his detention reported to the consular post concerned and of *his right* to communicate with the consular post." *Id.* at 60 (emphasis added).

3. *The United States' Post-Ratification Conduct Shows That Article 36 Creates Individual Rights*

"While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *Kolovrat*, 366 U.S. at 194. While the United States recently has taken the position in litigation that Article 36 does not create individual rights, this Court generally gives more weight to the government's application of the treaty in practice than the interpretation it has adopted for litigation purposes. See *Alaska* v. *United States*, 125 S. Ct. 2137, 2150 (2005); cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("We have never applied the principle of [*Chevron* deference] to agency litigating positions that are wholly unsupported by * * * practice."). Here, the United States' litigating position is belied by the "practical construction" that the Executive Branch has given to Article 36 since ratification. See *Saks*, 470 U.S. at 396 (looking to the "practical construction adopted by the parties").

To the extent that any single department of government (other than the courts) can be said to be "charged" with "enforcement" of the Vienna Convention, it is the State Department. And the State Department's "practical construction" of Article 36 makes clear that the Vienna Convention creates individual rights. The State Department's Foreign Affairs Manual "outlines the Department of State's policies, guidance and procedures in the important area of [United States consular] assistance to arrested U.S. citizens or nationals." U.S. Dep't of State Foreign Affairs Manual, 7 FAM 410, 411 (2004) (avail. at http://foia.state.gov/masterdocs/07fam/07m0410.pdf). In the section titled "Notification

Under the Vienna Convention on Consular Relations (VCCR)," the State Department declares:

> Article 36 of the VCCR * * * provides that the host government must notify a foreign national arrestee without delay of *the arrestee's right* to communicate with his or her consular officials, and must notify the consular officials without delay if the arrestee so requests.

7 FAM 420, 421.1-1 (2004) (avail. at http://foia.state.gov/masterdocs/07fam/07m0420.pdf) (emphasis added). The State Department could not be any clearer in declaring that the Convention creates a "right" and that it belongs to "the arrestee." Nor could there be confusion over the meaning of the word "right." The State Department defines the term "rights" as follows: "Civil rights under local or international law that are *possessed by a U.S. citizen who has been detained or arrested abroad.*" 7 FAM 410, *supra*, at 414 (emphasis added).

The State Department repeats that interpretation of Article 36 with equal clarity in its instructions to domestic law enforcement officials. The State Department's instructions emphatically and repeatedly describe consular notification as a "right": "In all cases, the foreign national must be told of the *right* of consular notification and access." United States Dep't of State, Consular Notification and Access 13 (avail. at http://travel.state.gov/pdf/CNA_ book.pdf) (emphasis added); see also *id.* at 3, 14, 19 (referring to consular notification and access as a "right"). The instructions are also abundantly clear that this "right" of notification and access resides with the individual national, since the "foreign national * * * has the option to decide whether he/she wants consular representatives notified of the arrest or detention." *Id.* at 14; see *id.* at 4, 13, 20-21.

The Nation's highest law enforcement official, the Attorney General, likewise has taken the view that Article 36 creates individually enforceable rights. In a June 3, 2004, letter to the Ambassador of Mexico regarding a Mexican

national facing trial here, then-Attorney General Ashcroft addressed the Ambassador's "concern that [the Mexican national] was not informed of his opportunity to consult with consular officials in accordance with the Vienna Convention on Consular Relations." Letter From Attorney General John Ashcroft to Ambassador Carlos de Icaza, at 2 (June 3, 2004). The Attorney General wrote:

> Consistent with the opinion of the International Court of Justice * * * [the defendant] is free to argue in the trial court that *his rights under Article 36 of the Vienna Convention were violated* by a failure to inform him of *his right* to contact his consulate once it was realized that he was a foreign national or there were grounds to think that he was probably a foreign national.

Ibid. (emphasis added). The statement that the *detained foreign national* may raise the violation in trial court—and the specific references to *his* rights under the Convention—would make no sense if the rights belonged to and could be asserted solely by foreign governments. Whatever the United States' litigating position in this case, its nonlitigation position—its practical construction of the Convention—has consistently been to recognize that it creates judicially enforceable individual rights. See *Li*, 206 F.3d at 75 n.4 (Torruella, J., concurring in part and dissenting in part).

4. *Post-Ratification Conduct Of Other Signatories And International Judicial Bodies Confirms That Article 36 Confers Individual Rights*

Other signatories to the Convention agree that the Convention creates individual, judicially enforceable rights. In this case and in *Medellín*, no fewer than 63 other Nations—including the members of the European Union and some of our closest allies—have submitted briefs urging that the Convention creates individual rights. In interpreting a multilateral treaty, "the subsequent interpretations of the signatories help clarify [its] meaning." *Saks*, 470 U.S. at 403.

The International Court of Justice ("ICJ") has reached the same conclusion. In *Breard*, this Court acknowledged that, although this Court is the final authority on matters of treaty interpretation within the United States, the Court "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. Because the Optional Protocol Concerning the Compulsory Settlement of Disputes accords the ICJ precisely that jurisdiction—to resolve "[d]isputes arising out of the interpretation or application of the Convention," Optional Protocol art. I—the ICJ's decisions are entitled to that respect.

Since this Court decided *Breard*, the ICJ has twice held that Article 36 does create individual rights. The first case, *LaGrand*, 2001 I.C.J. 466, concerned two brothers, both German citizens, who were arrested, tried, convicted, and executed in Arizona for committing capital murder. There was no dispute that the Arizona authorities had failed to inform the LaGrand brothers that they could request that the German Consulate be notified of their arrest. *Id.* at 481-482, ¶ 39. Germany brought suit in the ICJ, claiming that the United States had "violated the *individual rights* conferred on the detainees by Article 36." *Id.* at 481, ¶ 38 (emphasis added). Agreeing with Germany's construction of the Convention, the ICJ rejected the United States' assertion "that rights of consular notification and access under the Vienna Convention are rights of States, and not individuals." *Id.* at 493, ¶ 76. Looking to the text of Article 36, the ICJ found it significant that the last sentence of subsection (1)(b) states that "'said authorities shall inform the person concerned without delay of *his rights* under this subparagraph.'" *Id.* at 494, ¶ 77 (quoting Article 36(1)(b)). The ICJ also remarked that, under Article 36(1)(c), "the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposes such action.'" *Ibid.* (quoting Article 36(1)(c)). The ICJ concluded that the "clarity of these provisions, viewed

in their context, admits of no doubt" that Article 36 "creates individual rights." *Ibid.*

The ICJ reiterated and expanded on that construction more recently in *Avena*, 2004 I.C.J. 12. In *Avena*, Mexico argued that the United States had denied 54 Mexican nationals their individual rights under the Vienna Convention. *Id.* at 19-20, ¶ 12. Citing *LaGrand*, the ICJ again held that Article 36 creates individual rights in detained foreign nationals. *Id.* at 35-36, ¶ 40. The ICJ confirmed that an individual's rights under Article 36 "are to be asserted, at any rate in the first place, within the domestic legal system of the United States." *Id.* at 35, ¶ 40.

Those rulings are significant. When the Convention was ratified, and when *LaGrand* and *Avena* were decided, the United States had expressly agreed to submit all international "[d]isputes arising out of the interpretation or application of the Convention" to the compulsory jurisdiction of the ICJ. Optional Protocol art. I.[8] In signing and ratifying the Optional Protocol, the Executive and the Senate made an affirmative decision to vest the ICJ with authority to interpret the Vienna Convention.

5. *The Preamble To The Vienna Convention Does Not Contradict Article 36's Clear Text*

Notwithstanding Article 36's clear text, some courts have relied on its preamble to hold that it does not create individually enforceable rights. See, *e.g.*, *United States* v. *Emuegbunam*, 268 F.3d 377, 392 (6th Cir 2001). But a pre-

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[8] The United States was the Optional Protocol's original proponent. Its delegation urged that "the codification of international law and the formulation of measures to ensure compliance with its provisions should go hand in hand," and that a nation's response to the Optional Protocol was a measure of its "support for international law." 1 U.N. Official Records, *supra*, at 249, ¶ 37. On March 7, 2005, however, the President stated that the United States is withdrawing from the Optional Protocol. *Medellín*, 125 S. Ct. at 2101 (O'Connor, J., dissenting) (citing Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005)).

amble cannot override the plain text of the Convention itself, and the Convention's preamble in any event does not by its terms address the Article 36 rights at issue here.

Courts, of course, may look to preambles, titles, and headings as aids to interpretation when the section at issue is ambiguous *in and of itself*. See *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 483 (2001); *Bhd. of R.R. Trainmen* v. *Baltimore & O.R. Co.*, 331 U.S. 519, 528-529 (1947); *Price* v. *Forrest*, 173 U.S. 410, 427 (1899). But where the treaty or statutory text is clear, a court may not look to the preamble to create ambiguity, much less to override clarity. *Whitman*, 531 U.S. at 483 ("This eliminates the interpretive role of the title, which may only shed light on some ambiguous word or phrase in the statute itself.") (internal quotation omitted); *Trainmen*, 331 U.S. at 528-529 (repeating the "wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text"); *Price*, 173 U.S. at 427 ("[W]e must not be understood as adjudging that a statute, clear and unambiguous in its enacting parts, may be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute."). Here, because the language of Article 36 is not ambiguous *in and of itself*, the preamble is irrelevant.

Even considered on its own terms, however, the preamble does not preclude Article 36 from creating individual rights. The preamble provides, in relevant part:

> *The States Parties to the present Convention,* * * *
> *Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States, * * *
> *Have agreed* as follows[.]

As the Seventh Circuit has explained, "[t]he most reasonable understanding of this language is as a way of emphasizing that the Convention is not designed to benefit diplomats in their individual capacity, but rather to protect them

in their official capacity." *Jogi*, 425 F.3d at 381. The preamble, after all, by its terms is addressing the purpose of "privileges and immunities"—things traditionally enjoyed by diplomats and consular authorities under international law. Nowhere does the preamble purport to circumscribe the nature of the "*freedoms*" and "*rights*" the Convention accords to individual foreign nationals.

The report of the United States delegation to the Vienna Convention confirms that construction. As the report observes, the preamble to the Vienna Convention "follows closely" the preamble to the 1961 Vienna Convention on Diplomatic Relations. U.S. Delegation Report, *supra*, at 46 (citing Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227). The report clarifies that the preamble language merely acknowledges that "[b]oth conventions rest upon the premise that privileges and immunities are granted for governmental reasons, rather than for the benefit of *officers, members of families, and employees, as individuals.*" *Ibid.* (emphasis added).[9]

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[9] If the preamble were controlling, it would control *every* provision of the Vienna Convention—not just Article 36. Given that, it is not plausible to read the preamble's statement that "the purpose of such privileges and immunities is not to benefit individuals" as declaring that the rights created by the Vienna Convention can only be enforced between nations in the diplomatic arena. Article 43 of the Vienna Convention, for example, provides that "Consular officials and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions." To date, courts have allowed consular officials to raise Article 43 as a defense to suit, and in proper cases they have dismissed the suit for lack of jurisdiction. See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397-398 (9th Cir. 1991); *Gerritsen* v. *Escobar Y Cordova*, 721 F. Supp. 253, 258-259 (C.D. Cal. 1988). If the individual consular official being sued did not have a right to enforce Article 43 in court, but must submit to judicial proceedings until his country can negotiate a diplomatic solution on his behalf, the treaty's provision that he is "not to be amenable to the jurisdiction" of the domestic courts would be meaningless. The similar preamble to the Vienna Convention on Diplomatic

Finally, this Court has itself indicated that Article 36 "arguably confers on an individual the right to consular assistance following arrest." *Breard*, 523 U.S. at 376. Thus, even if the preamble were interpreted to raise a question as to whether Article 36 creates individual rights, that at most would establish that the "'treaty fairly admits of two constructions.'" *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 163 (1940)). As explained above, however, all the traditional aids to treaty interpretation, including drafting history, show that Article 36 clearly was intended to create individual rights. Numerous other signatories have reached that conclusion. And the international judicial body with jurisdiction to construe the Convention has reached that conclusion as well. If any doubt remained—and none does—the most venerable of principles of treaty interpretation would resolve it: "'[W]here * * * a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *Ibid.* Here, that preferred construction is compelled by text and history alike.

II. The Asserted State Procedural Bar Cannot Preclude Consideration Of Bustillo's Otherwise Valid Claim For Enforcement Of Article 36

A. Where The Violation Prevents Presentation Of Exculpatory Evidence, Procedural Bars Contravene Article 36's Requirement That Local Law Give "Full Effect" To Treaty Rights

The Vienna Convention expressly addresses the interaction between the "rights accorded under" Article 36 and the procedural rules of a particular legal system:

Relations, *supra*, would similarly render the diplomatic immunity provisions of that treaty meaningless. See *Tabion* v. *Mufti*, 73 F.3d 535, 538-539 (4th Cir. 1996) (affirming motion to quash service of process on grounds of diplomatic immunity despite language in preamble to the Vienna Convention on Diplomatic Relations).

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso*, however, that the said laws and regulations *must enable full effect to be given* to the purposes for which the rights accorded under this Article are intended.

Vienna Convention art. 36(2) (emphasis added). The treaty thus recognizes the potential for domestic procedural rules to frustrate full exercise of Article 36 rights, and it unambiguously forecloses application of such rules.

There can be little doubt that, as applied here, the Commonwealth's procedural bar prevented any effect (much less "full effect") from being given to Bustillo's Article 36 rights. Article 36 requires the States to *notify* detained foreign nationals of their right to consular access and to grant such access. It is undisputed that the Commonwealth failed to comply with those obligations. Neither law enforcement officials, nor prosecutors, nor the courts at any point advised Bustillo of his consular access rights. It is also undisputed that, as a result of that failure, Bustillo was not aware he even *had* such rights until well after his trial had concluded. To require Bustillo to assert the violation of those rights before trial—before he was aware of them, when his ignorance was itself a product of the violation—makes a direct result of the violation a reason for ignoring the violation. It is difficult to see how bootstrapping a consequence of the violation (Bustillo's ignorance and resulting failure to assert his rights) to preclude judicial cognizance gives "full effect" to the notification rights at issue.

Indeed, the Convention's express requirement that the foreign national be informed of his right to consular assistance necessarily *presumes* that the foreign national will not otherwise be aware of that right. It is precisely because foreign nationals generally will not know about Article 36's requirements that the Convention requires notification. See *Torres* v. *Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J., respecting denial of certiorari) ("It surely is reasonable to

presume that most foreign nationals were unaware of the provisions of the Vienna Convention (as are, it seems, many local prosecutors)."). It is difficult to fathom how a rule requiring foreign nationals to raise a violation of which they are unaware—and of which the State has, in violation of Article 36, kept them ignorant—gives "full effect" to the rights and purposes of Article 36. Such a result, for all practical purposes, would make Article 36's facially mandatory notification requirement enforceable only when it matters least: Detainees could seek redress for the State's failure to provide notice of their rights only in those cases when they receive notice of their rights before trial by other means. Cf. *Williams*, 529 U.S. at 404 (construction "must give effect, if possible, to every clause and word of a statute.") (internal quotation marks omitted).[10]

Such a result, moreover, is wholly inconsistent with the function of consular assistance under international law and the principles that animate the rules of forfeiture and

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[10] Imposing procedural bars for notification requirements would also "condone[] and encourage[] future violations" of Article 36. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 150 (2002). Charging a defendant with constructive knowledge of the very treaty rights for which the State fails to provide required notice—and then subjecting those rights to forfeiture when the defendant, ignorant of the rights, fails to assert them—effectively relieves the State of *any* practical consequences of the violation. Under such a rule, the State generally would have nothing to lose and everything to gain by failing to give (or to correct a failure to give) Article 36 notifications. If the defendant does not raise a Vienna Convention violation before trial, he might permanently lose the benefit of any exculpatory evidence the consulate might find; if the defendant does discover and raise the violation, he presumably will receive consular access before proceeding to trial, and the prosecution is no worse off than it would have been had it initially complied. This Court has often recognized that police officers respond to the incentives the law creates. See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996) (requiring *de novo* review of probable cause and reasonable suspicion determinations for warrantless searches because deferential review "would eliminate the incentive" to seek warrants).

waiver. Our adversary system of justice generally requires parties to assert their rights at trial on the assumption that the parties "know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). But that principle has no application where, as here, a treaty—the "supreme Law" on the issue—presumes that the party is *unaware* of his rights and for that very reason affirmatively obligates the State to advise him of the rights.

For the same reason, it is no answer to suggest that the defendant's *lawyer* should be charged with discovering and raising the violation before trial. As a matter of plain text, Article 36 requires *the State* to inform *the foreign national* of his right to consular notification and access. It nowhere gives the State the option of ignoring Article 36 so long as it provides the defendant with a lawyer who may (or may not) provide that notice. Requiring *defense counsel* to establish compliance with Article 36 before trial effectively transfers the notification duty from the State, where the Convention places it, to the lawyer.

Requiring foreign nationals who are not advised of their rights and do not learn of them until after trial to assert their violation in the trial court also conflicts with the basic purpose of consular access. Foreign nationals arrested here may come from nations with entirely different legal systems; they may have little or no understanding of our practices, the critical role of defense counsel, and their own role in planning a defense. Likewise, Americans detained abroad may confront wholly unfamiliar legal regimes. The State Department's Foreign Affairs Manual, 7 FAM 410, 412, admonishes consular employees that "[o]ur most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." By guaranteeing nationals arrested

in foreign countries a right to—and requiring that they be told of their right to—consular access, Article 36 helps those individuals understand the basic parameters of a foreign legal system before they are required to navigate it. A lawyer may not, consistent with the purposes of Article 36, unilaterally forfeit a foreign national's opportunity to communicate with his consulate and thereby develop a rudimentary understanding of our legal system—including an appreciation of the lawyer's role in it.[11]

Americans detained abroad may also confront unfamiliar legal systems, some in potentially oppressive regimes, where there is uncertainty about the role of their lawyers. In those circumstances, the fact that an American detainee was given a "lawyer" (of potentially questionable quality or loyalty) who never objected to the violation, and who himself kept the detainee ignorant of his treaty rights, would never be thought to excuse a violation of the Vienna Convention (especially given the consulate's role in helping the detainee understand the legal system he confronts). The same rule must apply here as well. The Vienna Convention establishes rules designed to operate in a multiplicity of legal systems, some very different from our own. It is for that reason that the Convention places the

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[11] That is consistent with the rule that "[w]hat suffices for waiver depends on the nature of the right at issue." *New York* v. *Hill*, 528 U.S. 110, 114 (2000). "For certain fundamental rights, the defendant must personally make an informed waiver," and courts may not impute a lawyer's silence to the defendant. *Ibid.* For example, although a defendant's lawyer typically has "full authority to manage the conduct of the trial," *id.* at 115, the defendant must be personally involved in deciding whether to exercise certain core rights, such as the right to counsel, *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938), and the right to plead not guilty, *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966). The same must be true with respect to a right—like the right of consular notification—that may be critical to the foreign national's understanding of our legal system and the role of his lawyer. While the issue in this case is one of forfeiture rather than waiver, see *United States* v. *Olano*, 507 U.S. 725, 733 (1993), the distinction makes no difference here.

burden of notification on the authorities of the detaining State, not on other individuals with potentially varying and debatable legal roles.

B. The Asserted Procedural Bar Makes It Impossible To Give "Full Effect" To Article 36 Claims Where, Absent The Violation, The Consulate Could Have Provided Exculpatory Evidence

Notwithstanding a general preference for contemporaneous objections, courts and Congress have repeatedly recognized that certain categories of claims are most appropriately raised post-trial or on collateral review. For example, claims arising under *Brady* v. *Maryland*, 373 U.S. 83 (1963), are, by their nature, virtually always first raised on collateral review, as in *Brady* itself. See *id.* at 85; see, *e.g.*, *Lovitt* v. *Warden*, 585 S.E.2d 801 (Va. 2003); *Syvertson* v. *State*, 699 N.W.2d 855 (N.D. 2005); *Pederson* v. *State*, 692 N.W.2d 452 (Minn. 2005); *Head* v. *Stripling*, 590 S.E. 2d 122 (Ga. 2003). Likewise, claims alleging ineffective assistance of counsel are generally "best suited" for collateral review. *Massaro* v. *United States*, 538 U.S. 500, 505 (2003). In those circumstances, courts generally do not require the defendant to raise the violation within the time for direct review because, during that time, the defendant often lacks notice of the violation or a meaningful opportunity to develop the necessary factual basis.

In *Massaro*, for example, the petitioner first raised his ineffective-assistance-of-counsel claim in his motion for postconviction relief under 28 U.S.C. § 2255. The Second Circuit found the claim procedurally defaulted, holding that "when the defendant is represented by new counsel on appeal and [an] ineffective-assistance claim is based solely on the record made at trial, the claim must be raised on direct appeal." 538 U.S. at 503. This Court unanimously reversed. Noting that "'[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time,'" *id.* at 504 (quoting *Guinan* v. *United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J.,

concurring)), the Court announced an across-the-board rule that such claims may be raised on collateral review. *Id.* at 507. The Court explained that, if such claims had to be pressed on direct review, "appellate counsel and the court [would have to] proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 504-505. Even if the defendant correctly claims that his representation was constitutionally deficient, "without additional factual development, an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id.* at 505. That would present the untenable risk that "[e]ven meritorious claims would fail * * * [because] the trial record [would be] inadequate to support them." *Id.* at 506. Further, an appellant facing possible forfeiture of the claim (but unable on the existing record to determine its viability) would have the "perverse incentive[]" "to bring claims * * * regardless of merit." *Ibid.* The resulting deluge of claims would require courts "'to search for needles in haystacks'" to identify the "'rare claim'" that is capable of resolution, wasting judicial resources on issues more efficiently resolved on collateral review. *Id.* at 507 (quoting *Guinan*, 6 F.3d at 475 (Easterbrook, J., concurring)).

The assertion of procedural bars to preclude post-conviction review of Article 36 claims suffers from the same defects. As an initial matter, of course, a defendant who has not been notified of his rights under Article 36 often will not be aware of the most basic predicate of the violation—*i.e.*, the existence of the rights themselves. But even assuming awareness, the defendant generally will lack the full factual predicate necessary to obtain relief. It is generally agreed that a Vienna Convention "violation should result in the overturning of a final judgment of conviction [only upon] some showing that the violation had an effect on the trial." *Breard*, 523 U.S. at 377 (citing *Arizona* v. *Fulminante*, 499 U.S. 279 (1991)); see also *Avena*, 2004 I.C.J. at 59-60,

¶ 121.[12] But proof (or disproof) of prejudice generally requires a record. The foreign national at the very least must have the consular contact he was previously denied and determine what, if any, assistance the consulate would have rendered. Until the contact occurs, he will not be in a position to know whether he could successfully meet the prejudice requirement. Requiring defendants to raise violations before they have that opportunity would, just like the rule rejected in *Massaro*, create a "perverse incentive[]" to raise claims before it is possible to determine their merit. 538 U.S. at 506-507.

Here, for example, Bustillo could not have presented his Article 36 claim until he learned of his rights; figured out what assistance the Honduran Consulate could have provided; identified the additional evidence that might have been gathered as a result; and determined whether any such help would have made a difference at trial. It was for that very reason that, upon learning of the violation, Bustillo's counsel on direct appeal (unsuccessfully) sought a *remand* to the trial court "for consideration of a renewed motion to set aside the verdict" based on "the substantive measures the Honduran Government could have taken to assist [Bustillo's] defense had the consulate been timely apprised" of the charges. Aplt.'s Motion to Remand, *Bustillo* v. *Commonwealth*, Nos. 2321-98-4 & 2422-98-4 (Va. Ct. App. Mar. 5, 1999). Simply put, most foreign nationals subjected to a violation will not learn that they had a right to consular notification and assistance until after trial. When they do learn of the violation, they do not and cannot know whether they can state a valid claim under Article 36 until they have

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[12] It does not appear that courts have clearly articulated which of the several prejudice standards would apply to the type of Vienna Convention violation at issue here. Cf. *United States* v. *Dominguez Benitez*, 542 U.S. 74, 86-87 (2004) (Scalia, J., concurring) (outlining various prejudice formulae). It is not necessary to decide that question here, and Bustillo would meet *any* reasonable standard.

the contact with the consulate they were initially denied and identify the assistance that could have been rendered. A rule that forfeits rights under Article 36 before the foreign national and his consulate can develop the necessary factual predicate does not give "full effect" to the purposes underlying Article 36.

Equally troubling, defendants with potential Article 36 claims "would feel compelled to raise the issue" on direct review, *Massaro*, 538 U.S. at 504, when the record "often [will be] incomplete or inadequate" to support their claims, *id.* at 506. The resulting risk that "[e]ven meritorious claims would fail," *id.* at 506, increases if Article 36 claims are deemed to require a detailed showing of prejudice. Cf. *id.* at 505 ("Without additional factual development, * * * an appellate court may not be able to ascertain whether the alleged error was prejudicial."). Absent remands to the trial court of the sort the Virginia courts refused to provide here, only collateral review provides a mechanism through which evidence supporting prejudice can be developed and placed in the record. See also *Breard*, 523 U.S. at 376.

Any remaining doubt that the bar prevents "full effect" from being given to Bustillo's Article 36 rights disappears in light of the ICJ's repeated pronouncements that such bars are often inconsistent with the treaty's text and purpose. As this Court has noted, "the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" is entitled to "respectful consideration." *Breard*, 523 U.S. at 375. Twice within the past four years, the ICJ has held that the Convention does not permit a receiving State to invoke a procedural bar rule where the foreign national was not aware of his rights because the State "failed to carry out its [notification] obligation under the Convention." *LaGrand*, 2001 I.C.J. at 488, ¶ 60; see *Avena*, 2004 I.C.J. at 56-57, ¶¶ 112-114.

In *LaGrand*, the United States argued that the asserted violation of Article 36 was not cognizable because the foreign nationals had not raised the issue on direct appeal of

their state convictions or on state habeas. 2001 I.C.J. at 487-488, ¶ 58. The ICJ rejected that argument because the bar left insufficient time or required the claim to be raised before the detainee knew of his right. Such rules do "not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the sending state." *Id.* at 497, ¶ 90. Accordingly, the ICJ ruled that the asserted procedural bar "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under [Article 36] are intended,' and thus violated paragraph 2 of Article 36." *Id.* at 498, ¶ 91 (quoting Vienna Convention, art. 36(2)).

The ICJ reaffirmed and expanded that holding last year in *Avena*. That case concerned Mexico's claim that 54 Mexican nationals facing capital punishment in the United States had been denied their rights under Article 36 of the Vienna Convention. The United States contended that any rights foreign nationals enjoyed under the Convention were subject to a panoply of procedural default rules, and that the potential availability of executive clemency allowed "full effect" to be given to Article 36 even if judicial review was otherwise barred. *Avena*, 2004 I.C.J. at 55-56, ¶ 110. The ICJ rejected that argument, noting that *LaGrand* had prohibited the use of procedural bars where the foreign national's failure to raise the claim stemmed from the State's failure to comply with its notification obligations. *Id.* at 56-57, ¶ 112. *Avena* further directed "the United States to permit review and reconsideration of these nationals' cases by the United States courts," *id.* at 59-60, ¶ 121, and held that "the clemency process, as currently practiced within the United States criminal justice system, * * * [is] not sufficient in itself" to satisfy Article 36, *id.* at 66, ¶ 143.

Notably, the President has since confirmed that pursuit of treaty interests may require States to set aside procedural bars in specific cases. See *Medellín*, 125 S. Ct. at 2090 (noting President's February 28, 2005, Memorandum directing Texas courts to reconsider the claims of certain Mexican nationals). Although the United States has asserted that the President's authority to issue an order directing state courts to consider particular claims derives at least in part from "his constitutionally based foreign affairs power," U.S. Br. at 9, in *Medellín* v. *Dretke*, 125 S. Ct. 2088 (2005), it is highly questionable whether anything but the Convention itself could provide a legitimate basis for that intrusion into state judicial proceedings. Construing the Vienna Convention to require the state court action presumably would make the President's order, seeking to enforce the treaty, well within his power. A contrary construction of the Convention raises serious constitutional questions about the Executive's authority to order state courts to set aside procedural rules and consider claims absent a treaty or other federal law obligating them to do so. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." See *Jones* v. *United States*, 526 U.S. 227, 239 (1999) (internal quotation marks omitted).

The ICJ's guidance (like the President's implementing memorandum) did not exist when this Court issued its *per curiam* opinion in *Breard* stating (without full briefing or argument) that the Vienna Convention does not displace procedural bars on federal habeas corpus. See 532 U.S. at 375-376. For that reason alone, *Breard* is not controlling here. *Breard* anticipated the possibility that "an international court with jurisdiction to interpret" the Convention (*i.e.*, the ICJ) might reach a contrary interpretation, *id.* at 375, 379, and that the ICJ's interpretation would be entitled to "respectful consideration" by this Court, *id.* at 375. "In the past the Court has revisited its interpretation of a

treaty when new international law has come to light." *Medellín*, 125 S. Ct. at 2105 (O'Connor, J., dissenting) (citing *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 89 (1833)).

Moreover, *Breard*'s statements regarding the meaning of the Convention were unnecessary to the result in that case, for two reasons. First, the Court found that the necessary showing of prejudice was lacking in any event. 523 U.S. at 377. As explained below, such is not the case here. Second, in *Breard*, the *federal habeas statute*—as amended by AEDPA in 1996—foreclosed the *federal habeas* relief sought because the petitioners had not adequately developed the record in state court proceedings. 523 U.S. at 376-377. The Court stated that, even if the Vienna Convention otherwise required review, the bar imposed by the later-enacted provision of the federal habeas statute would control. When "a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Ibid.* The federal habeas statute that controlled the outcome in *Breard*, of course, has no application to this case, which arises on state habeas. Moreover, state laws (unlike federal laws) cannot displace federal treaty obligations. In any event, the fact that the federal habeas statute generally requires anyone with a claim based on "treaties of the United States" to "develop the factual basis of [that] claim in State court proceedings," *id.* at 376, further supports the conclusion that States cannot refuse foreign nationals an opportunity to develop the record relating to Vienna Convention violations like the one Bustillo asserts here.

C. The Procedural Bar Also Prejudices The Truth-Finding Capacity Of The Criminal Justice System

Requiring Vienna Convention claims to be raised before trial or on direct review also defeats one of the fundamental purposes of Article 36—to ensure that foreign nationals are on a level playing field when navigating a potentially unfa-

miliar legal system far from home. Properly observed, Article 36 aids the truth-finding function of the American criminal justice system by giving foreign nationals the tools necessary to mount a full and fair defense. Among other things, Article 36 ensures that detained foreign nationals have notice of their right to communicate with consular officials, who may have unique access to critical information relating to guilt or sentencing. See, *e.g.*, *LaGrand*, 2001 I.C.J. at 477, ¶ 22. Depriving foreign nationals of those rights—and upholding potentially erroneous convictions where the jury never saw critical exculpatory evidence that the consulate could have provided—is not merely inconsistent with the purposes of Article 36. It is also irreconcilable with the central purpose of our criminal justice system: to convict only the guilty while acquitting the innocent.

This case illustrates that point all too well. Here, the Vienna Convention violation deprived Bustillo of crucial evidence showing that Sirena—not Bustillo—killed James Merry. After all, it was Sirena whom the police found near the crime scene shortly after the crime, with red stains on his clothes, J.A. 134; it was Sirena who, after being stopped, gave the police false and inconsistent statements about where he was coming from, J.A. 134-135; it was Sirena who fled to Honduras the day after Merry died, J.A. 32; and it was Sirena who later bragged to friends about having committed the murder—describing it in graphic detail—in a secretly videotaped conversation. J.A. 35-42.

In fact, it is hard to imagine a case where consular assistance could be more critical. Bustillo's defense was not merely that he, a Honduran national, did not commit the crime. It was that *another Honduran national*, Sirena, committed the crime and that Sirena had *fled to Honduras* the day after the victim died. Because Sirena is a Honduran and had returned to Honduras, the Honduran Consulate was uniquely positioned to provide critical evidence relating to him, his whereabouts, and his involvement in the

crime. In a trial like this one, which turned entirely on closely divided eyewitness testimony, the evidence the Honduran Consulate could have provided would likely have proved pivotal.

Bustillo's trial counsel had great "difficulty finding evidence to corroborate the existence of" a Honduran national "named 'Sirena,'" J.A. 164 n.38, and even the police claimed they had no probative evidence of his existence, J.A. 118-119. Further, the only evidence available at trial of Sirena's flight from this country—shortly after the victim died—was the testimony of Ulma Martinez, who claimed she saw Sirena on a Continental Airlines flight to Honduras the day after Merry's death. 3/18/98 Tr. at 168-169.

Exploiting that dearth of evidence, the prosecution suggested to the jury that Sirena was a convenient defense fabrication. J.A. 21-22. The Commonwealth's closing referred to "this so-called Sirena"; pointed out that no one seemed even to know his last name; and repeatedly called him and his unavailability "convenient." J.A. 21-22. The prosecution likewise attacked Ulma Martinez's testimony that she saw Sirena on a flight to Honduras the day after Merry died, asserting that "[s]he still doesn't know [Sirena's] full name"; that "[t]he plane tickets you have are for that witness, not for this Sirena"; and casting doubt on whether the "so-called Sirena" "was on the plane" at all. J.A. 21-22.

Had the Commonwealth apprised Bustillo of his Vienna Convention rights, those arguments—virtually the entirety of the Commonwealth's response to the Sirena defense—would have been unavailable. The Government of Honduras has represented that, had it been advised of the case, it at least would have been able to provide biographical data and a picture of Sirena. J.A. 32, 73-74.[13] That would have

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[13] The Commonwealth has never disputed Bustillo's sworn statement that, had he been informed of his rights, he would have requested to speak with consular officials. See J.A. 60. Nor has the Commonwealth

precluded any suggestion that Sirena was a convenient defense invention, for he would be a real person with a picture and history. It is one thing to point to a real person as the alternative suspect; it is quite another to point to a phantom. More important, the photograph itself could have proved invaluable when questioning witnesses and addressing their recollections. When the police interviewed witnesses, none was shown Sirena's photo (or a photo of anyone else at the crime scene); only Bustillo's was included in the array. But when confronted with the photo of Sirena provided by the Honduran government, numerous eyewitnesses identified Sirena as the individual who struck Merry. J.A. 61, 65, 98, 100, 106. An actual photograph thus would have made Sirena a real person in the eyes of the jury, and it could have been used to confront witnesses at trial.

The Honduran Consulate, moreover, has averred that it would have produced official, indeed, irrefutable immigration records showing that Sirena *in fact* fled the United States for Honduras the day after James Merry died. J.A. 32, 73-74. Sirena's flight, once proven, is powerful evidence of Sirena's guilt and thus petitioner's innocence. See *California* v. *Hodari D.*, 499 U.S. 621, 624 n.1 (1991) (The guilty "flee when no man pursueth.") (quoting Proverbs 28:1); *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000) ("Headlong flight * * * is the consummate act of evasion" that is "suggestive" of "wrongdoing"). The prosecution and Sirena himself understood as much. See J.A. 239 (prosecutor's acknowledgment that flight shows consciousness of guilt); J.A. 37-38 (surreptitious video of Sirena conceding that he fled because he feared he would get "burned"). The Commonwealth was sufficiently concerned by the evidence of Sirena's flight at trial—even when it was supported solely by Martinez's testimony—that it directly attacked Martinez's credibility, pointing out the lack of documentary evi-

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disputed the statements of Honduran officials that they could have provided significant assistance. J.A. 32, 73-74.

dence, mentioning her inability to provide Sirena's surname (she only knew him to go by "Sirena" and "Julio"), and questioning whether he was on the flight at all. J.A. 21-22. Those arguments would have been foreclosed absent the Vienna Convention violation.

Moreover, it is likely that, had the Honduran Consulate been advised of Martinez's testimony that a "Julio" was on the plane to Honduras, it could have provided the defense with Sirena's full name, now known to be Julio Osorto. J.A. 73 ("The records of the [Honduran government] reflect that a young man named 'Julio' arrived in Tegucigalpa, Honduras on Continental Flight 769 on December 17, 1997 and that * * * his full name is JULIO CESAR OSORTO HERRERA."). That information would, in turn, have allowed the defense to issue a more specific *Brady* request to prosecutors, identifying Sirena's proper surname. Such a demand would have either increased the likelihood that the Commonwealth would have timely produced the Mahoney Report detailing the suspicious stop of "Julio C. Osorto" on the night of the attack, J.A 134-135, or, alternatively, heightened the scrutiny the Commonwealth would have faced for failing to do so. See *United States* v. *Agurs*, 427 U.S. 97, 106 (1976) ("When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.").

Finally, Honduras has also represented that it would have attempted to locate Sirena and interview him. J.A. 32. The potential impact of such an effort should not be underestimated. Acting with fewer resources, petitioner's habeas counsel ultimately was able to locate Sirena in Honduras and convince an associate of Sirena's to surreptitiously videotape two conversations with him. In those conversations, Sirena both acknowledged that Bustillo was wrongly accused and confessed to Merry's killing with self-authenticating detail. J.A. 33-55. Consistent with the witness testimony, Sirena stated that he attacked Merry with a baseball bat while Merry was outside the Popeye's

smoking a cigarette. J.A. 38. Consistent with testimony that the attacker was wearing red, Sirena stated that he had been "wearing a red sweater." J.A. 41. And, consistent with the Mahoney Report's statement that Sirena had alcohol on his breath when stopped by police, Sirena stated that, after striking Merry, he hid out in a field, where he drank a six-pack of beer. J.A. 40-41. That lattermost assertion is particularly striking because, at the time of Sirena's confession, the Mahoney Report—and its statement that Sirena's breath smelled of alcohol, J.A. 135—had not yet been disclosed. Better self-authenticating detail is difficult to imagine.

In sum, Virginia's failure to observe Bustillo's Vienna Convention rights deprived him of evidence that not only raises a reasonable doubt about his guilt, but also strongly supports his innocence. The evidence would have cut to the core of the prosecution's case—and supported the defense's consistent claim that Sirena was the real killer—in a case marked by divided witness testimony. Yet the asserted bar, coupled with the Commonwealth's violation of the treaty's notification requirement, has precluded any court from considering that. It is one thing for the courts to resist, on collateral review, complaints about the admission of probative physical evidence. See *Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976). But it is quite another to refuse to address treaty violations that prevent the jury from learning the whole truth and impair the truth-finding function that lies at the core of our judicial process.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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DECEMBER 2005

APPENDIX A

CONSTITUTIONAL AND TREATY PROVISIONS

1. The Supremacy Clause of The Constitution of the United States of America, art. VI, cl. 2, provides in relevant part:

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

2. Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, provides in relevant part:

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national

who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

3. The Optional Protocol Concerning the Compulsory Settlement of Disputes, April 24, 1963, art. I, 21 U.S.T. 325, provides in relevant part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

APPENDIX B

Convention on Consular Relations.

Convention on consular relations. Done at Vienna April 24, 1963; entered into force March 19, 1967; for the United States December 24, 1969.

21 UST 77; TIAS 6820; 596 UNTS 261.

States which are parties:

Albania
Algeria
Andorra
Angola
Antigua & Barbuda
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahamas, The
Bahrain [1]
Bangladesh
Barbados [1]
Belarus
Belgium
Belize
Benin
Bhutan
Bolivia
Bosnia-Herzegovina
Brazil
Bulgaria [1]
Burkina Faso
Burma [1, 2]
Cameroon
Canada
Cape Verde
Chile
China [3]
Colombia
Congo, Dem. Rep.
Costa Rica
Cuba [2]
Cyprus
Czech Rep.
Denmark [1, 2]
Djibouti
Dominica
Dominican Rep.
East Timor
Ecuador
Egypt [2]
El Salvador
Equatorial Guinea
Eritrea
Estonia
Fiji [2]
Finland [1, 2]
France [1]
Gabon
Georgia
German Dem. Rep. [1, 4]
Germany, Fed. Rep. [1, 4]

Ghana
Greece
Grenada
Guatemala
Guinea
Guyana
Haiti
Holy See
Honduras
Hungary
Iceland [1]
India
Indonesia
Iran
Iraq [2]
Ireland
Italy [2]
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kiribati
Korea, Dem. People's Rep.
Korea, Rep.
Kuwait [1]
Kyrgyz Rep.
Laos
Latvia
Lebanon
Lesotho [1]
Liberia
Libya
Liechtenstein
Lithuania
Luxembourg
Macedonia
Madagascar
Malawi
Malaysia
Maldives
Mali
Malta [2]
Marshall Is.
Mauritania
Mauritius
Mexico [2]
Micronesia
Moldova
Mongolia
Morocco [1,2]
Mozambique [1]
Namibia
Nepal
Netherlands [1,5]
New Zealand
Nicaragua
Niger
Nigeria
Norway [1]
Oman [1]
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar [2]
Romania [1]

Russian Fed.
Rwanda
St. Kitts & Nevis [6]
St. Lucia
St. Vincent & the Grenadines [6]
Sao Tome & Principe
Saudi Arabia [2]
Senegal
Serbia and Montenegro
Seychelles
Slovak Rep.
Slovenia
Solomon Is. [6]
Somalia
South Africa
Spain
Sudan
Suriname
Sweden [2]
Switzerland
Syrian Arab Rep. [2]
Tajikistan
Tanzania
Thailand
Togo
Tonga
Trinidad & Tobago
Tunisia
Turkey
Turkmenistan
Tuvalu
Ukraine
United Arab Emirates [1]
United Kingdom [1, 7]
United States
Uruguay
Uzbekistan
Vanuatu
Venezuela
Vietnam, Socialist Rep. [2]
Viet-Nam, Rep. [8]
Western Samoa
Yemen (Sanaa) [2, 9]
Yugoslavia [10]
Zimbabwe

NOTES

[1] With a statement.

[2] With reservation(s).

[3] Applicable to Hong Kong and Macao. See note under CHINA in bilateral section.

[4] See note under GERMANY, FEDERAL REPUBLIC OF in bilateral section.

[5] Applicable to Aruba and Netherlands Antilles.

[6] See under country heading in the bilateral section for information concerning acceptance of treaty obligations.

[7] Extended to Anguilla and territories under the sovereignty of the United Kingdom.

[8] See Vietnam footnote under AUTOMOTIVE TRAFFIC: convention of September 19, 1949 (3 UST 3008; TIAS 2487; 125 UNTS 22).

[9] See note under YEMEN in bilateral section.

[10] See note under YUGOSLAVIA in bilateral section.

(18)

Supreme Court, U.S.
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JAN 31 2006
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No. 05-51

In The Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, in his official capacity as Director of the Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF THE RESPONDENT

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QUESTION PRESENTED

In its Order granting certiorari, this Court limited this matter to the following question:

> Whether, contrary to the International Court of Justice's interpretation of the *Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights?

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INTRODUCTION

The Petitioner, Mario Bustillo, is a citizen of Honduras and a convicted murderer. Following his arrest, the police did not inform him that he had an opportunity to contact the Honduran Consulate. Although this claim was never raised at trial, Bustillo argues that this failure to inform him of his opportunity to contact the consulate entitles him to habeas relief. The Supreme Court of Virginia – relying on a long-established adequate and independent state ground – denied relief. Although this Court limited the grant of certiorari to a single question presented, that question actually involves two distinct issues:

1. Does the *Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("*VCCR*"), create judicially enforceable individual rights?
2. If so, does the *VCCR* require state courts to ignore state law?

The first issue – whether the *VCCR* creates judicially enforceable individual rights – is a straightforward question of treaty interpretation. Virtually all American appellate courts to address the issue have concluded that the *VCCR does not* create judicially enforceable individual rights.[1] *See Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192,

[1] Of course, some federal trial courts have reached the opposite conclusion. *See United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *United States v. Hongla-Yamache*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999).

195-98 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (*en banc*); *Gomez v. Kentucky*, 152 S.W.3d 238, 242 (Ky. App. 2004); *New Mexico v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *North Carolina v. Aquino*, 560 S.E.2d 552, 556 (N.C. App. 2001); *Oregon v. Sanchez-Llamas*, 108 P.3d 573, 578 (Or.), *cert. granted*, 126 S. Ct. 620 (2005); *Cauthern v. Tennessee*, 145 S.W.3d 571, 626 (Tenn. App. 2004); *Shackleford v. Virginia*, 547 S.E.2d 899, 905 (Va. 2001); *Wisconsin v. Navarro*, 659 N.W.2d 487, 494 (Wis. App. 2003). *But see Jogi v. Voges*, 425 F.3d 367, 382 (7th Cir. 2005). Similarly, appellate courts in the Australian States and Canadian Provinces have determined that the *VCCR does not* create judicially enforceable individual rights. *See R. v. Abbrederis*, (1981) 51 F.L.R. 99, 115 (N.S.W.) (*VCCR* deals "with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation."); *R. v. Partak*, [2001] 160 C.C.C. (3d) 533, 570 (Ont.) ("[T]he Vienna Convention appears to deal with obligations between states as opposed to obligations owed to nationals."); *R. v. Van Bergen*, [2000] 261 A.R. 387, ¶ 15 (Alta.) ("The Vienna Convention creates an obligation between states and is not one owed to [an individual]."). However, the International Court of Justice has concluded that the *VCCR* does create judicially enforceable individual rights – at least in context where there is a possibility that a foreign national faces a "severe" criminal penalty such as a capital case.[2] *See Avena and Other Mexican Nationals*

[2] In the United States, decisions of the International Court of Justice regarding the *VCCR* are, at best, persuasive authority. *Cf.* S. Afr. Const. § 39(1)(b) (When interpreting the South African Bill of Rights, courts must consider international law.). Under our Constitution, the ultimate authority to adjudicate the meaning of federal law – including treaties –

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(Mexico v. United States), 2004 I.C.J. 12, ¶ 151 (Mar. 31); *LaGrand (Federal Republic of Germany v. United States)*, 2001 I.C.J. 466, ¶ 77 (June 27).

The second issue – whether the *VCCR* requires state courts to ignore state law – is "about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Exercising its sovereign powers, Virginia has determined both the substantive scope and the procedure for obtaining a writ of habeas corpus in its own courts. *See Virginia Code* § 8.01-654 (establishing the writ of habeas corpus). Because the *VCCR* claim could have been raised at trial and was not, Virginia law prohibits the Virginia courts from considering the claim in a habeas corpus proceeding. *See Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974). "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," *Coleman*, 501 U.S. at 729. *See also Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1872). Thus, under this Court's well established precedents, habeas corpus relief is unavailable. *See Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977). *See also Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979). Indeed, state laws – including state procedural default rules – govern a state court's implementation of the *VCCR*. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*).[3]

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rests with this Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[3] Moreover, "neither the text nor the history of the [*VCCR*] clearly provides a foreign nation a private right of action in United States' courts to

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In order for Bustillo to prevail on both issues, this Court must (1) ignore the plain language of the *VCCR*, its treaty preparation materials, and its consistent application by the many signatory nations over more than thirty years; (2) contravene the interpretation of the Executive Branch on an issue of foreign relations; (3) overrule *Breard;* (4) transgress the principles of *Teague v. Lane*, 489 U.S. 288, 306-07 (1989); (5) violate the States' sovereignty; and (6) exalt the application of a treaty over the Constitution.

STATEMENT OF THE CASE

1. Bustillo's Crime

On the evening of December 10, 1997, at about 7:30 p.m., James Merry and three friends, Jesse Konstanty, Michelle Gutierrez, and Valeria Landaeta were eating dinner inside a Popeye's restaurant in Springfield, Virginia. Tr. 3/17/98 at 100, 125, 127.[4] Ms. Gutierrez looked out into the parking lot and saw three cars parking. The cars' occupants started pointing at the group. Ms. Gutierrez warned her friends not to leave the restaurant because she thought something was going to happen. Tr. 03/17/98 at 127. Ms. Gutierrez knew these men were members of the Commerce Street Locos, a gang. Tr. 03/17/98 at 148.

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set aside a criminal conviction and sentence for violation of consular notification provisions." *Breard*, 523 U.S. at 377. *See also Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (*per curiam*) (Sovereign immunity of the National Government bars suit by foreign nation to enforce *VCCR*.); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934) (Sovereign immunity bars suit by foreign nation against a State.).

[4] Throughout this brief, references to the trial transcript are designated as "Tr. (date of trial) at ___." Although the trial transcript is not part of the Joint Appendix, these transcript citations may assist this Court in understanding the factual background.

Shortly thereafter, the men, around fifteen of them, entered the restaurant. Ms. Gutierrez recognized many of these men, including Bustillo, and an individual known to her as "Sirena." Tr. 03/17/98 at 129-30. She believed the men were drunk because their speech was slurred. They threatened Mr. Merry and Mr. Konstanty in Spanish, accusing them of fighting with members of their gang on another occasion. Ms. Gutierrez said they were mistaken, that neither Mr. Merry nor Mr. Konstanty was Hispanic or understood anything they were saying. The group insisted, "[n]o . . . it was him, it was him in the red car." Tr. 03/17/98 at 128. She insisted that they were mistaken because "he drives a blue car." The group looked at each other, after which Bustillo shook Mr. Merry's hand, and said, in Spanish, "Oh. I'm sorry. We got you mistaken." Tr. 03/17/98 at 129. One of them said "We have no problems with you. It's your friend that we want to get an opportunity to meet." Tr. 03/17/98 at 221. They left, and Ms. Gutierrez, who was still nervous, warned her friends to stay in the restaurant. Tr. 03/17/98 at 130. Nevertheless, Mr. Merry went outside to smoke a cigarette. Meanwhile, the gang members were walking around the parking lot. Ms. Gutierrez then saw Mr. Merry lean against a sign and light a cigarette. He appeared to be talking to Cristina Hondoy, who was facing him. Bustillo ran up, swung a baseball bat, hit Mr. Merry on the left side of his head, and ran away. Tr. 03/17/98 at 131, 181. Because of this attack, Mr. Merry died.[5]

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[5] The blow fractured Mr. Merry's skull in several places. Tr. 03/17/98 at 205. Dr. Frances Field, the medical examiner who examined Mr. Merry's body, testified that such an injury would cause blood to "seep" into the inner ear and then out of the ear canal. Tr. 03/17/98 at 193. Following the attack, Mr. Merry's brain continued to swell,

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The police arrived soon after the attack and questioned a number of individuals. That night police recovered two baseball bats at the scene, fifty to seventy-five yards east of the Popeye's restaurant. Tr. 03/17/98 at 116. Neither bat had blood on it. Tr. 03/17/98 at 108. Mr. Bustillo was the only perpetrator identified to the police. Tr. 03/17/98 at 53, 67-69. The police subsequently arrested Bustillo and charged him with the murder of Mr. Merry. Although Bustillo is a citizen of Honduras, the police failed to advise him that he could contact Honduran consular officials.

2. Bustillo's Trial

a. Virginia's Case Against Bustillo

Bustillo, with the assistance of retained counsel, was tried for the murder on March 17-20, 1998. At his jury trial, Mr. Konstanty, Ms. Gutierrez, and Ms. Landaeta testified that Bustillo was the assailant.[6] Tr. 03/17/98 at 131, 138. Prior to trial, Ms. Gutierrez and Mr. Konstanty, separately and without hesitation, selected the petitioner's photograph from a spread Detective Richard Cline showed them. Tr. 03/18/98 at 39, 41-42; Tr. 03/18/98 at 21-22, 28. Ms. Landaeta went to the same school as Bustillo, where she would see him every day because she shared a class with him. Tr. 03/18/98 at 20-21. She also knew that Bustillo lived approximately

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shutting down his other organs, and he eventually died after life supports were discontinued. Tr. 03/17/98 at 207.

[6] Moreover, a member of Bustillo's gang, Nicolas Parada, told the police he had seen Bustillo strike Mr. Merry with the bat. Tr. 03/17/98 at 265; Tr. 03/18/98 at 51-52. At trial, however, he provided a different version, saying he saw the "kid had fallen down and . . . that Jesse [Konstanty] was chasing Mario [Bustillo] and Julio Sirena." Tr. 03/17/98 at 263. He could no longer recall whether Bustillo had a bat. Tr. 03/17/98 at 264.

five minutes from the Popeye's restaurant, and she, Ms. Gutierrez, and another friend showed the police where Bustillo lived. Tr. 03/18/98 at 22-23, 43, 67.

b. Bustillo's Defense

Bustillo claimed that a gang member nicknamed Sirena was responsible for the attack. Amilcar Amaya, who had been a member of Bustillo's gang, said he observed "Señor Julio," a/k/a Sirena, walk towards the area where Mr. Merry was standing. Tr. 03/18/98 at 90, 98-99. According to Mr. Amaya, when Sirena was close, he moved to the right, took out a bat, and hit Mr. Merry on the side of the head. Tr. 03/18/98 at 100, 110. Mr. Amaya testified that he did not see Bustillo there that evening at all, either inside or outside the restaurant, and stated that he was the one who shook hands with Mr. Merry inside the restaurant. At the time of trial, police did not know Sirena's identity. Tr. 03/18/98 at 70. He was referred to by one witness as having a first name "Julio." No one could provide the police with a last name or any information about Sirena. Tr. 03/18/98 at 70.[7] Moreover, although several individuals had a clear view of the incident, not a *single* eyewitness told the police that Sirena was the one who struck the fatal blow. Tr. 03/18/98 at 53, 67-68, 69. The jury found Bustillo guilty of the murder of Mr. Merry.

3. The Appeals

After several post-trial motions were denied, Bustillo then appealed his conviction with the assistance of retained

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[7] Sirena is referred to variously as Julio Sorto; Ostorto, Julio; Osorto, Julio C.; and Julio Cesar Osorto Herrera. Tr. 03/18/98 at 70; J.A. at 67.

counsel. Virginia's intermediate appellate court, the Court of Appeals, affirmed. *See Bustillo v. Virginia*, 2000 WL 365930 (Va. App. 2000) (unpublished). The Supreme Court of Virginia affirmed the decision without comment. *See Bustillo v. Virginia*, No. 001110 (Va. 2000) (unpublished). This Court also declined to review the decision. *See Bustillo v. Virginia, cert. denied,* 532 U.S. 1072 (2001).

4. State Habeas Corpus Petition

Bustillo, again with the assistance of retained counsel, filed a petition for a writ of habeas corpus in the state trial court alleging, among other things, that his *VCCR* rights were violated.[8] On May 3, 2002, Bustillo filed an "addendum" seeking to "augment" his habeas petition. He alleged that the *VCCR* obligation was "absolute and nondelegable" but argued, in the alternative, that his retained counsel was ineffective for failing to advise Bustillo of his right to consult with the Honduran consulate. He later filed a motion for leave to amend his petition on this ground. The Director objected on the ground that this amendment did not "relate back" to the original claims and was barred by the statute of limitations. *Virginia Code* § 8.01-654(A)(2).

On August 8, 2002, the trial court dismissed the *VCCR* claim based on *Slayton*, holding that Bustillo "had ample time to raise the issue at trial or on appeal." J.A. at 129.[9]

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[8] Bustillo also contended that his attorney was ineffective in a number of particulars and the prosecution and police had engaged in numerous acts of misconduct. State courts found these claims were without merit and they are not at issue in this Court.

[9] The order did not address the "addendum" or requested amendment seeking to raise a claim of ineffective assistance of counsel for

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5. Appeal of the Denial of the State Habeas Petition

Bustillo petitioned the Supreme Court of Virginia to hear his appeal of the denial of the habeas petition. J.A. at 170. The Supreme Court of Virginia denied the Petition and observed that "there is no reversible error in the judgment complained of. . . ." J.A. at 241.

6. The Petition for a Writ of Certiorari

Bustillo then asked this Court to review various aspects of the decision of the Supreme Court of Virginia. This Court granted certiorari, but limited the issues to the first question presented. *See Bustillo v. Johnson, cert. granted,* 126 S. Ct. 621 (2005). J.A. at 243. This Court also consolidated this matter with Number 04-10566.

SUMMARY OF ARGUMENT

The *VCCR* does not create judicially enforceable individual rights. First, as the text, the Executive Branch's interpretation, the ratification history, and the interpretations

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failing to inform Bustillo of his *VCCR* rights. The Director filed a motion for clarification, with an affidavit from trial counsel, asking the court to rule on this claim. Bustillo's trial counsel explained in his affidavit that he was the son of a diplomat and was aware of the *VCCR*. He deliberately did not advise his client of the *VCCR* because he did not want his client to speak to anyone for fear that these conversations might then be used against him at trial. The trial court entered an order amending the memorandum opinion on October 11, 2002, holding that the requested amendment was barred by the statute of limitations and, furthermore, had no merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). J.A. at 132-33. Bustillo never raised the issue on appeal. J.A. at 184-85.

of foreign nations all demonstrate, the *VCCR* does not create individual rights. Second, even if it does create individual rights, those rights are not judicially enforceable.

If the *VCCR* creates judicially enforceable individual rights, then the *VCCR* does not require state courts to ignore state law – their rules of procedural default. First, because Bustillo cannot obtain habeas relief, this Court need not address the issue of whether state courts are required to ignore state law. Second, if the issue is addressed, then the *VCCR* does not require state courts to ignore state law. Third, any interpretation of the *VCCR* that requires state courts to ignore, indeed refashion, state law raises grave constitutional concerns. The doctrine of constitutional doubt requires rejection of such an interpretation.

ARGUMENT

I. THE *VCCR* DOES NOT CREATE JUDICIALLY ENFORCEABLE INDIVIDUAL RIGHTS.

A. The *VCCR* Does Not Create Individual Rights.

1. The Text of the *VCCR* Does Not Create Individual Rights.

This Court has established certain principles of treaty interpretation. First, "treaties are construed more liberally than private agreements, and to ascertain their meaning [this Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). "In construing a treaty, as in construing a statute, [this Court

will] first look to its terms to determine its meaning."[10] *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). *See also Air France v. Saks*, 470 U.S. 392, 396-97 (1985) ("[T]he analysis must begin, however, with the text of the treaty and the context in which the written words are used."). The preamble to the treaty forms an integral part of a treaty's textual analysis.[11] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (relying on preamble to interpret treaty). Moreover, the Vienna Convention on the Law of Treaties provides that the preamble is an integral part of a treaty. *See Vienna Convention on the Law of Treaties, supra*, 1155 U.N.T.S. 331.[12] *See also Restatement (Third) of the Foreign Relations Law of the United States* pt. III Intro. Note (Vienna Convention on Treaties constitutes a codification of existing customary international law on the point.).

Second, "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. . . ." *Restatement, supra*, at § 907, cmt. A (1987). "One of the key characteristics of international law

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[10] Article 31 of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *Vienna Convention on the Law of Treaties*, art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 340.

[11] Indeed, the preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See United States v. John*, 437 U.S. 634, 654 n.8 (1978) (preamble signed by Choctaw Nation stricken from treaty as ratified by the United States Senate).

[12] The United States has not ratified the *Vienna Convention on the Law of Treaties*, but the Executive Branch has accepted it as "the authoritative guide to current treaty law and practice." S. Doc. Exec. L., 92nd Cong., 1st Sess. at 1 (1971).

is that it often features a notable lack of connection between rights and remedies. Unlike many modern legal systems, international law seems comfortable with the position that some of its norms may confer rights, the violation of which may well be irremediable." David J. Bederman, *The Spirit of International Law* 192 (2002). "Orthodox international law doctrine has regarded states as the primary, or even sole, actors in international law – the only entities that scholars considered to enjoy full 'international legal personality,' meaning that they could create and be the direct subject of international legal obligations." Jeffrey L. Dunoff, Steven R. Ratner, & David Wippman, *International Law, Norms, Actors, Process* 105 (2002). *See Frelinghusen v. Key*, 110 U.S. 63, 71 (1884) ("No nation treats with a citizen of another nation except through his government."); *Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."). *Cf. Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."). Government officials responsible for negotiating treaties do so with these well established principles in mind. As this Court noted in a different context, "[w]e presume that Congress understands the legal terrain in which it operates, *see Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979), and we therefore expect Congress to state clearly any intent to reshape that terrain." *United States v. Texas*, 507 U.S. 529, 540-41 (1993). Finally, to the extent there is ambiguity in the treaty language regarding the creation of judicially enforceable rights, the ambiguity is resolved by the customary

presumption against the creation of treaty-based individual rights.[13]

Applying these principles of treaty interpretation, the *VCCR* does not create individual rights. First, the preamble to the *VCCR* plainly states that its purpose "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *VCCR, supra,* at 79. The text of the *VCCR*, through its preamble, thus explicitly disclaims any intent to benefit individuals.[14] Of course, Bustillo contends that

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[13] *See Emuegbunam*, 268 F.3d at 389 ("In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them."); *Li*, 206 F.3d at 67 (Seyla, J., joined by Boudin, J., concurring) ("Ambiguity brings into play the background presumption in respect to treaties between States – a presumption which holds that they do not create rights that private parties may enforce in court."); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."). *Cf. Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.").

[14] Indeed, in its decisions, the International Court of Justice has consistently relied on the language of the preambles in interpreting treaties. *See Case Concerning Sovereignty Over Certain Frontier Land (Belgium v. Netherlands)*, 1959 I.C.J. 209, 221-22 (June 20) (relying on preamble of a Boundary Convention as embodying "the common intention of the two states"); *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. 625, 652-53 (Dec. 17) (excluding, in boundary dispute, an interpretation of one of the provisions in a controlling Convention given the object and purpose stated by the preamble to the Convention); *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 196 (Aug. 27) (after examining preamble, Court states it "can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects."); *Asylum Case (Columbia v. Peru)*, 1950 I.C.J. 266, 282 (Nov. 20) (relying on the preamble to interpret Article 2 of the Havana Convention). However, the clear preamble of the *VCCR* inexplicably escaped the

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the preamble was meant just to clarify the fact that the *VCCR* does not benefit consular officials in their individual capacity, but rather protects them in their official capacity. *Bustillo Br.* at 32-33. However, that is not what the preamble says – it plainly disclaims any intent to benefit *individuals,* not merely consular officials. Furthermore, the preamble provides that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." *Id.* Judicial enforcement of consular notification was unheard of before *LaGrand.*

Second, the introductory sentence of Article 36 of the *VCCR* specifies the provisions of that section were drafted "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending state," not with a view to create any individual rights that can be judicially enforced. This Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France,* 470 U.S. at 399. The text of Article 36 shows that the parties to the *VCCR* did not draft that section to protect criminal defendants.

Third, while Article 36 of the *VCCR* discusses a "right" of access to consular officials, this reference merely reflects the creation of *rights among the signatory nations.* Just as the consular official exercises the rights created by the *VCCR,* so does the individual. The signatory nation can seek redress for any violation of the rights created under the *VCCR,* both for its citizens and for its consular officials. The

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notice of the International Court of Justice when it examined a case involving inmates sentenced to death in the United States. *See Avena,* 2004 I.C.J. at ¶ 50; *LaGrand,* 2001 I.C.J. at ¶ 77.

right to communicate with a consul is a means of implementing the treaty obligation as between the signatory nations. Indeed, any other way of phrasing the burdens placed on the signatory nations would be both artificial and awkward. *See Li*, 206 F.3d at 67-68 (Seyla, J., joined by Boudin, J., concurring).

Fourth, the Director's interpretation of the term "rights" is consistent with other "rights" mentioned elsewhere in the treaty.[15] Article 36, paragraph 2, of the *VCCR* provides that

> The *rights* referred to in *paragraph 1* of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

VCCR, supra, at art. 36, ¶ 2 (emphasis added). Paragraph 1(b), provides that "authorities shall inform the person concerned without delay of his rights . . . " and paragraph 1(c) specifies that "consular officers shall have the right to visit a national of the sending State. . . ." *Id.* at art. 36, ¶ 1(b) and 1(c). Assuming the word "rights" does not change its meaning within the same article of the same treaty, Bustillo's contention that the word "rights" creates a judicially cognizable cause of action would signify that individuals as well as foreign nations must be permitted to litigate their "rights" in state and federal courts. This

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[15] For example, Article 9 of the *VCCR* mentions the "right" to designate consular officers other than the head of the consular post. Article 22 discusses the "right" to appoint citizens of another state as consular officers. Article 29 provides a "right" to display the national flag and the coat of arms.

would constitute an extraordinary departure from past practice.[16] *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) ("an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States" does not waive the sovereign immunity of a foreign nation.).

2. The Executive Branch Has Never Viewed the *VCCR* As Creating Individual Rights.

The Constitution chiefly confers the conduct of foreign affairs to the President. *See* U.S. Const. art. II, § 2 cl. 1 & 2; U.S. Const. art. II, § 3. Consequently, "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines*, 525 U.S. at 168. *See also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation

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[16] Moreover, Bustillo's argument ignores the paradoxical and highly undesirable consequences that naturally follow a conclusion that the *VCCR* creates judicially enforceable individual rights. There is no reason that the burdens imposed by the vindication of this purported individual right should rest exclusively with a host government. If the right of consultation with a consulate truly belongs to the individual, an American court could, at the behest of a detained foreign national, order a foreign nation to assist him. Thus, a Mexican citizen could obtain a court order from a state or federal court compelling a Mexican consulate to assist him. Similarly, a United States citizen detained overseas could invoke such an individual right of consular assistance and hail the United States into a foreign court for failing to assist him. Indeed, the family of a Canadian citizen actually is currently litigating whether Canada is obligated to provide such assistance. *See Khadr v. Canada (Minister of Foreign Affairs)*, [2004] 123 C.R.R. (2d) 7, 23 (Fed. Ct.) (remanding for further proceedings).

and enforcement is entitled to great weight."); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (same).

The Executive Branch has *never* construed the *VCCR* as creating a right vested in an individual. To the contrary, the State Department has consistently opined that the "right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals. . . ." *Li*, 206 F.3d at 67-68 (quoting U.S. State Dep't, *Answers to the Questions Posted by First Circuit* (2000)). Similarly, in 1970, the Executive Branch advised the States' Governors that it did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States." *See Li*, 206 F.3d at 64 (quoting letter).[17]

For this Court to repudiate the Executive Branch's consistent interpretation of the *VCCR* would create a risk of conflict between the Executive Branch and this Court. In addition, the prospect of judicial repudiation of the Executive Branch's interpretation of treaties would likely deter the United States from entering into other beneficial conventions. *See* Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 Va. L. Rev. 1475, 1480-82 (2001).

3. The Ratification History Indicates That the *VCCR* Does Not Create Individual Rights.

The ratification history indicates that the *VCCR* does not create individual rights. The Executive Branch submitted

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[17] *Statement Before the Senate Committee on Foreign Relations*, S. Exec. Rep. No. 91-9, 91st Cong. at 5 (May 8, 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep't of State).

written testimony to the Senate stating that the "Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions," except with respect to a warrant requirement not relevant here. Appendix, S. Doc. Exec. E, 91st Cong., 1st Sess. (1969). Furthermore, the Chairman of the Senate Committee on Foreign Relations issued a report recommending ratification of the *VCCR* to the Senate. This report highlighted the *VCCR's* preamble and listed five factors that assisted the Committee in approving the treaty. The first of those factors was the Committee's belief that "the Convention does not change or affect present U.S. laws or practice." S. Doc. Exec. E, 91st Cong., 1st Sess. (1969). Manifestly, the Senate did not intend to create any individual rights.

4. Other Nations Have Not Interpreted the *VCCR* as Creating Individual Rights.

"The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart,* 489 U.S. 353, 369 (1989). *See also Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 260 (1984) (the conduct of the signatory nations "in implementing that [treaty], in the first 50 years of its operation cannot be ignored."). If the *VCCR* creates individual rights that are judicially enforceable, one would expect that numerous foreign courts would have reached that conclusion.

Despite the fact that the *VCCR* has been in effect for more than thirty-five years and has been adopted by over 160 nations, there is a striking lack of judicial decisions holding that the Treaty creates individual rights. Indeed,

appellate decisions from signatory nations reach the opposite conclusion. *See Abbrederis*, 51 F.L.R. at 116; *Partak*, 160 C.C.C. (3d) at 570; *Van Bergen*, 261 A.R. at ¶ 15. The practice of other nations illustrates that the *VCCR* does not create judicially enforceable individual rights.

B. Even if the *VCCR* Does Create Individual Rights, Those Rights Are Not Judicially Enforceable.

Even if the *VCCR* does create individual rights, those rights are not judicially enforceable. First, the Treaty's text does not provide for judicial enforcement.[18] Second, the fact that the *VCCR* is "self-executing" does not mean that it can be judicially enforced. Third, a foreign national has other remedies for violations of the *VCCR*.

1. The *VCCR*'s Text Does Not Provide for Judicial Enforcement.

If the signatory nations to the *VCCR* wished to displace national or local law, then they would have done so in explicit terms.[19] Indeed, recognizing that law regarding intestacy is

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[18] Similarly, the mere fact that a statute or regulation confers a benefit on an individual does not mean that the individual can enforce that statute or regulation in federal court. *See Gonzaga University v. Doe*, 536 U.S. 273, 285-89 (2002) (Family Educational Rights and Privacy Act may not be enforced by private parties); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (certain Title VI implementing regulations cannot be enforced by private parties).

[19] Indeed, as this Court has recognized, where a treaty provides for judicial enforcement, Congress frequently enacts legislation to facilitate the private enforcement of individual rights under a treaty. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 461-62 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute);

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left to the American States, this Court observed, "treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms." *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). For example, the *Hague Convention on the Civil Aspects of International Child Abduction*, art. 7, Oct. 25, 1980, T.I.A.S. 11,670, 1343 U.N.T.S. 98, explicitly provides for judicial or administrative proceedings.[20] Similarly, the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, U.S. Dep't of State, *Treaties in Force* 413 (Jan. 2005), 660 U.N.T.S. 195 (entered into force for the United States, Nov. 20, 1994), provides that signatory nations engage themselves to provide "effective protection and remedies, through the competent national tribunals and other State institutions," *id.* at art. 6, and that signatory nations "may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention." *Id.* at art. 14. A

United States v. Blaine, 139 U.S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51, 56-57 (1888); *Alling v. United States*, 114 U.S. 562 (1885); *Great Western Ins. Co. v. United States*, 112 U.S. 193, 200 (1884); *Frelinghuysen*, 110 U.S. at 74.

[20] For the implementing legislation, *see The International Child Abduction Remedies Act*, 42 U.S.C. §§ 11601-11610.

nineteenth-century extradition treaty between the United States and the United Kingdom provided in relevant part that "the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged" and that "the examining judge or magistrate" was required "to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive." *United States v. Rauscher*, 119 U.S. 407, 411 (1896).

The text of the *VCCR* does not provide for any domestic judicial remedy.[21] Instead, the United States ratified the *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes*, opened for signature Apr. 24, 1963; 21 U.S.T. 325, 596 U.N.T.S. 487 (entered into force for signatory nations Mar. 19, 1967; for the United States, Dec. 24, 1969; United States withdraws, Mar. 7, 2005). The *Optional Protocol* provides in the unambiguous language of its preamble that the parties "[e]xpress[] their wish to resort in *all matters* concerning them in respect of *any dispute arising out of the interpretation or application* of the Convention to the compulsory jurisdiction of the International Court of Justice. . . ." *Id.* (emphasis added).[22]

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[21] It is not surprising that the United States sought no domestic judicial enforcement of the *VCCR* given the hollow nature of such a remedy in many of the world's courts. These courts would have included, at the time, the U.S.S.R. and its satellites, nations whose judiciaries did not distinguish themselves by their impartiality and independence. Problems of corruption, judicial independence, and lack of access to courts continue to plague many of the world's judiciaries. *See* Human Rights Watch, *World Report 2005* (2005).

[22] The International Court of Justice cannot entertain private lawsuits; its constituting statute restricts the court to resolving

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Moreover, while many delegates to the negotiating sessions complained about the heavy burden *notification* would place upon their nation, not a single delegate raised any complaint about any judicial enforcement mechanism purportedly created by the *VCCR*. Official Records, *United Nations Conference on Consular Relations,* Vienna, Mar. 4-Apr. 22, 1963, U.N. Doc. A/Conf. 25/16 (1963) 36 (statement of the representative of the United Arab Republic) 52 (statement of the representative of Tunisia) 336-37 (statement of the representative of Thailand). Given the wide divergence in the legal systems of the many signatory nations, the absence of any discussion concerning the modalities of its domestic judicial implementation is telling.

Finally, if this Court were to hold that the mere mention of the word *rights* in a treaty is sufficient to confer judicial redress, such a holding would usher in a new era of treaty-based litigation. For example, the *Geneva Convention Relative to the Treatment of Prisoners of War*, Art. 28, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, provides that a representative of the prisoners has a "right" to participate in the management of a canteen fund. If this individual is displeased with the United States military's management of the canteen and the canteen fund, the representative could initiate a legal action to seek judicial redress.

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disputes between nation states. *See Statute of the International Court of Justice*, art. 34(1), opened for signature June 26, 1945, 59 Stat. 1031, T.S. 993. Had the drafters of the *VCCR* intended to create a judicial remedy for the violations of its terms, they could have readily accomplished this purpose.

2. The Fact that the *VCCR* Is "Self-Executing" Does Not Mean That It Can Be Judicially Enforced.

The fact that the *VCCR* is described as "self-executing" does not alter the previous analysis. The term "self-executing" is often erroneously conflated with the distinct concept of invocability, which is akin to the domestic law concept of standing. "Whether a treaty is self-executing is not to be confused with whether the treaty creates private rights or remedies." *Restatement, supra*, at § 131 cmt. h (1987). *See also* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis,* 86 Am. J. Int'l L. 310, 317-18 (1992). A self-executing treaty is one that takes effect upon ratification and requires no separate implementing statute. *See Restatement, supra*, at § 111(4). Invocability, on the other hand, refers to the person or entity that is "entitled to invoke or rely on the treaty norms." Jackson, *supra*, at 317-18. *See also Li*, 206 F.3d at 67-68 (Seyla, J., joined by Boudin, J., concurring) ("Whether the terms of such treaty provide for private rights, enforceable in domestic courts, is a wholly separate question. The fact that the concepts are sometimes lumped together does not detract from their distinctiveness. At bottom, the questions remain separate. It follows inexorably that the self-executing character of a treaty does not by itself establish that the treaty creates private rights.").

3. A Foreign National Has Remedies for Violations of the *VCCR*.

The absence of judicial enforcement of the *VCCR* does not mean that the foreign national lacks a remedy. First, redress for any violations of the *VCCR* lies in accord with long-standing custom in the diplomatic or political arena.

Treaties have historically depended "on the interest and honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. at 598. "[I]nfraction becomes the subject of international negotiations and reclamations." *Id.* In such matters, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.*

Second, in addition to any redress through the customary diplomatic channels, nothing prevents a foreign national from raising, under the right facts, a claim of ineffective assistance of counsel for failing to obtain consular assistance.[23] Under our Constitution, all criminal defendants – regardless of nationality – are entitled to effective assistance of counsel. *See Strickland*, 466 U.S. at 686. An effective counsel representing a foreign national would at least recognize and consider the possibility of contacting the foreign national's consul as part of the pretrial preparation. *See Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) ("Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national.").

II. THE *VCCR* DOES NOT REQUIRE STATE COURTS TO IGNORE STATE LAW.

If this Court concludes that the *VCCR* creates judicially enforceable individual rights, then this Court will have to address the implications of that conclusion for

[23] Interestingly, Bustillo raised such a claim in the habeas proceedings in the trial court. However, after the trial court denied the claim, he failed to appeal it to the Supreme Court of Virginia.

state courts confronting habeas claims based on the Vienna Convention. Bustillo argues that the *VCCR* requires state courts to ignore state law – their rules of procedural default.

A. Because Bustillo Cannot Obtain Habeas Relief, This Court Need Not Address the Issue of Whether the *VCCR* Requires State Courts to Ignore State Law.

It is unnecessary for this Court to address Bustillo's assertion that the *VCCR* requires state courts to ignore state law. Quite simply, Bustillo, as a matter of law, cannot obtain habeas relief. First, because *VCCR* violations are not cognizable as habeas claims, Bustillo cannot obtain habeas relief. Second, even if *VCCR* violations were cognizable, Bustillo's claim for habeas relief would still be barred by *Teague*.

1. Violations of the *VCCR* Are Not Cognizable in Habeas Proceedings.

Although the *VCCR* has the force and effect of a federal statute, *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888), not every violation of a federal statute provides grounds for habeas relief. *See Reed v. Farley*, 512 U.S. 339, 358 (1994). *See also Medellin v. Dretke*, 125 S. Ct. 2088, 2090 (2005) (stating that a claim for violation of the *VCCR* might not be cognizable in habeas proceedings). Indeed, a violation of federal statutory rights is not cognizable in habeas proceedings unless there is "a fundamental defect which inherently results in a complete miscarriage of

justice [or] an omission inconsistent with the rudimentary demands of fair procedure."[24] *Hill v. United States*, 368 U.S. 424, 428 (1962). *See also United States v. Timmreck*, 441 U.S. 780, 783 (1979); *Davis v. United States*, 417 U.S. 333, 346 (1974) (both applying the fundamental defect test). Moreover, the number of violations that qualify as a "fundamental defect" is limited. *Reed*, 512 U.S. at 357 (Scalia, J., joined by Thomas, J., concurring) ("The class of procedural rights that are *not* guaranteed by the Constitution (which includes the Due Process Clauses), but that nonetheless *are* inherently necessary to avoid 'a complete miscarriage of justice,' or numbered among 'the rudimentary demands of fair procedure,' is no doubt a small one, if it is indeed not a null set.").

Assuming that the *VCCR* confers individual rights that are judicially enforceable, the violation of those rights is not a "fundamental defect."[25] While foreign nationals might benefit from being advised of their ability to notify their consulate, the failure to inform them of their ability cannot be equated with a denial of the right against self-incrimination, the right to counsel, the right to a speedy trial, the right to be tried by a jury of one's peers, the right to cross-examine witnesses, or the right to appeal. Rather,

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[24] While the "fundamental defect" test was developed in the context of this Court's review of a federal court judgment, its reasoning is equally applicable to this Court's review of a state court judgment. The rationale for the "fundamental defect" test – that not every violation of federal law justifies habeas relief – is equally applicable to both federal and state proceedings.

[25] Indeed, the International Court of Justice, albeit *in dicta*, concluded that "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that" the *VCCR* establishes "a fundamental human right that constitutes part of due process in criminal proceedings." *Avena*, 2004 I.C.J. at ¶ 124.

the failure to advise one of the ability to contact one's consulate can be equated to the failure to comply with the formal requirements of the Interstate Agreement on Detainers or the formal requirements for taking guilty pleas. *See Reed*, 512 U.S. at 346 (claim that trial court failed to comply with the formal requirements of the Interstate Agreement on Detainers is not cognizable in habeas corpus proceedings); *Timmreck*, 441 U.S. at 783 (Claim that trial court failed to comply with formal requirements for taking guilty pleas is not cognizable in habeas corpus proceedings).

Accordingly, *VCCR* violations are not cognizable in habeas corpus proceedings. Therefore, because Bustillo cannot obtain habeas relief, this Court need not address the issue of whether the *VCCR* requires state courts to ignore state law.

2. Habeas Relief Is Barred by The *Teague* Doctrine.

If the *VCCR* confers judicially enforceable individual rights and if claims based on those rights are cognizable in habeas proceedings, then the *Teague* doctrine bars Bustillo's claim for habeas relief.

Under *Teague*, if a state court denies habeas relief based on *federal* law and this Court later announces a "new rule" of federal law, federal courts will not overturn the original state court judgment.[26] *Teague*, 489 U.S. at

[26] Although *Teague* was developed in the context of this Court's review of a federal court judgment, its reasoning also applies to this Court's review of a state court judgment. The rationale for *Teague* – that convicted individuals should not be allowed to relitigate their convictions simply because this Court has announced a new rule – is equally applicable to this Court's review of both federal and state judgments.

306-07. In other words, if the state court correctly interpreted federal law at the time of its decision, that decision will be respected – even where this Court later changed or clarified the law. Because a state conviction becomes final when this Court denies certiorari, *see O'Dell v. Netherland*, 521 U.S. 151, 157 (1997), Bustillo's conviction became final when this Court denied certiorari on June 4, 2001. *See Bustillo*, 532 U.S. at 1072. Therefore, Bustillo can obtain habeas relief only if he can demonstrate that the rule he seeks to enforce – that *VCCR* creates judicially enforceable individual rights – existed prior to June 4, 2001.

As a matter of law, Bustillo cannot meet this burden. First, Bustillo unquestionably seeks both the announcement, and the benefit, of a "new rule." In *Breard*, a decision Bustillo asks this Court to overrule, the Court specifically relied on a state procedural default to dismiss a claim based on the *VCCR*. *See Breard*, 523 U.S. at 375. Second, even if *Avena* and *LaGrand* are somehow regarded as announcing a new rule binding on this Court and the lower courts, both of those decisions were rendered *after* Bustillo's conviction. *Avena* was decided more than two years after Bustillo's conviction became final – and more than six years after his trial. *LaGrand* was decided on June 27, 2001, just over three weeks after this Court denied certiorari. Third, neither exception to the holding in *Teague* applies to this case. The *VCCR* is not even arguably part of the "narrow class" of watershed rules of criminal procedure "implicit in the concept of ordered liberty." *Beard v. Banks*, 542 U.S. 406, 416-17 (2004) (citation omitted). Nor is the proposed new rule one that would forbid punishment "of certain primary conduct [or . . .] rules prohibiting a certain category of punishment for a class of defendants because of [their] status or offense." *Id. See also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)

(same). Accordingly, Bustillo cannot obtain habeas relief. Given that *Teague* bars habeas relief, there is no reason to inquire as to whether state courts are required to ignore state law.[27]

B. The *VCCR* Does Not Require State Courts to Ignore State Law.

If this Court concludes that it is necessary to address the issue of whether the *VCCR* Convention requires state courts to ignore state law, then this Court should conclude that the *VCCR* does not require state courts to ignore state law. This is so for three reasons. First, *Breard* holds that the *VCCR* does not require state courts to ignore state law. There is no reason to revisit that holding. Second, although the International Court of Justice has articulated a contrary view, its reasoning is fundamentally flawed. Third, the failure of a foreign national to raise the *VCCR* claim at trial does not justify requiring state courts to ignore state law.

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[27] Of course, this proposed course of decision represents a departure from this Court's usual practice. Generally, the issue of whether a habeas claim is procedurally defaulted is addressed before the issue of whether *Teague* bars the claim. *See Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). However, "there may be exceptions to the rule that the procedural bar issue should be resolved first. One case might be where the procedural bar question is excessively complicated, but the *Teague* issue can be easily resolved." *Id.* at 547 (O'Connor, J., dissenting). In this matter, the *Teague* issue is straightforward and easily resolved, but the procedural default issue involves complex questions of treaty interpretation and dual sovereignty. Accordingly, in this instance, this Court should decide the *Teague* issue first.

1. *Breard* Holds That the *VCCR* Does Not Require State Courts to Ignore State Law.

In *Breard*, this Court held that state law – including state procedural default rules – governs a state court's implementation of the *VCCR*. *Breard*, 523 U.S. at 375. This Court, applying an international law principle, concluded that the law of the forum State controls absent "a clear and express statement to the contrary." *Id.* The *VCCR* contains no such clear and express statement.[28] *Id.* Indeed, by providing that the rights "shall be exercised in conformity with the laws and regulations of the receiving State," the *VCCR* itself actually reinforces the background international law principle. *Id.* Moreover, "a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear." *El Al Israel Airlines*, 525 U.S. at 181 (1999) (Stevens J., dissenting). The same principle applies with respect to federal statutes. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 351 (1994); *CSX Transp., Inc. v. Easterwood*,

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[28] The *VCCR* provides that the "laws and regulations [of the receiving State] must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *VCCR*, *supra*, art. 36(2). This statement is hardly "a clear and express statement" that dispenses with the presumption that "the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard*, 523 U.S. at 375. Moreover, if the President and the Senate had intended for the Treaty to require state courts to ignore state law, they presumably would have made an explicit mention of such a provision. Yet, nothing in the text, ratification debate, or the *travaux preparatoires* of the Treaty supports the idea that the President, in negotiating and the Senate in ratifying the Treaty intended to make this extraordinary and unprecedented intrusion into a State's jurisprudence.

507 U.S. 658, 664 (1993); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Any intent of the *VCCR* to override state law is hardly clear. *Cf. Gonzales v. Oregon*, 126 S. Ct. ___, ___ (2006) (Congress did not have a "far reaching intent to alter the federal-state balance" and not did not authorize the National Attorney General "to effect a radical shift of authority from the States to the National Government to define general standards of medical practice in every locality."). In fact, the Senate, far from contemplating a radical, unprecedented intrusion on state law, relied on the representation of the Executive Branch that the *VCCR* did not change existing law. S. Doc. Exec. E., 91st Cong., 1st Sess. (1969).

In sum, *Breard* was correct when it was decided and remains correct today. *Stare decisis* recommends against revisiting *Breard*'s holding that the *VCCR* does not require state courts to ignore state law.

2. The Contrary Decisions of the International Court of Justice Are Fundamentally Flawed.

Of course, the International Court of Justice concluded that the *VCCR* requires state courts to ignore state law. *See Avena*, 2004 I.C.J. at ¶¶ 107-41; *LaGrand*, 2001 I.C.J. at ¶¶ 90-91. Specifically, the International Court of Justice interpreted the Full Effect Clause of the Treaty, *VCCR, supra*, art. 36(2) as requiring American state courts to ignore their own laws and consider *VCCR* claims that were otherwise procedurally barred.[29] *Avena*, 2004 I.C.J. at ¶¶ 132-34,

[29] The Full Effect Clause of the Treaty provides that laws of the forum state "must enable full effect to be given to the purposes for

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153(9); *LaGrand*, 2001 I.C.J. at ¶ 128(7). However, the International Court of Justice's reasoning is simply wrong.[30]

As a textual matter, Article 36(2) of the *VCCR* provides that the rights mentioned in the preceding section must be "*exercised* in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *VCCR, supra*, art. 36(2) (emphasis added). The plain language of this provision refers to the "exercise" of the rights, not to an after the fact judicial redress for any violation of the terms of the *VCCR*.[31] In other words, a nation may not impose

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which the rights accorded under this Article are intended." *VCCR, supra*, art. 36(2).

[30] Although this Court has relied on decisions from the International Court of Justice as evidence of the norms of international law, *see United States v. Maine*, 475 U.S. 89, 99-100 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985), it has never declared itself bound by those decisions. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 n.27 (2004) (International Court of Justice decision did not establish a rule of law prohibiting arbitrary detentions.).

[31] The same "full effects" language appears in multilateral conventions relating to piracy, hostage taking, terrorism financing and terrorist bombings. It would be incongruous, to say the least, for the United States government to seek greater procedural protections for foreign nationals, terrorists and pirates, than for United States citizens. *See International Convention for the Suppression of the Financing of Terrorism*, opened for signature Dec. 9, 1999, U.S. Dep't of State, *Treaties in Force* 512 (Jan. 2005), 2178 U.N.T.S. 229 (1999) (entered into force for the United States July 26, 2002); *International Convention for the Suppression of Terrorist Bombings*, Art. 7(4), Dec. 15, 1997, U.S. Dep't of State, *Treaties In Force* 512 (Jan. 2005), 2149 U.N.T.S. 284 (1998) (entered into force for the United States July 26, 2002); *International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Art. 7(4), Mar. 10, 1988, U.S. Dep't of State, *Treaties in Force* 462 (Jan. 2005) 1678 U.N.T.S. 221 (1988)

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unreasonably restrictive visitation hours, detain foreign nationals in remote, inaccessible locales, or impose other measures that would restrict the "exercise" of the rights. The treaty preparation materials show this was the concern of the diplomatic delegations. *See* Official Record, *Conference on Consular Relations, supra,* at 40,347.

3. The Possibility That a Foreign National May Fail To Raise a *VCCR* Claim at Trial Does Not Justify Requiring State Courts to Ignore State Law.

The possibility that a foreign national may not raise a *VCCR* claim at trial and, thus, forfeit the right to raise it in collateral proceedings does not justify requiring state courts to ignore state law. Bustillo argues that a criminal defendant cannot be expected to raise the issue of his *VCCR* rights at trial because he will not be aware of them. *Bustillo Br.* at 35. However, few criminal defendants will be aware of the subtleties of the Fourth, Fifth, Sixth and Eighth Amendments, nor will they understand how to examine witnesses, conduct legal research, authenticate exhibits, or make motions. Expecting an effective counsel to recognize and consider raising a Treaty claim at trial is no different than expecting an effective counsel to recognize and consider raising a *constitutional* claim at trial. Put another way, there is no reason to exalt a *VCCR* claim over all other claims including constitutional claims.

(entered into force for the United States on March 6, 1995); *International Convention Against the Taking of Hostages*, Art. 6(4), Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205 (1983). Moreover, a holding that this language creates individual rights and supersedes all defaults would place courts in the role of adjudicating sensitive foreign affairs issues.

Because the *VCCR* does not require state courts to ignore state law, Bustillo's habeas petition raising a Treaty claim is barred by Virginia law.[32]

C. Under the Doctrine of Constitutional Doubt, This Court Must Conclude That the *VCCR* Does Not Require State Courts to Ignore State Law.

As explained above, the *VCCR* does not require state courts to ignore state law. However, if this Court concludes that the *VCCR* is somehow ambiguous on the issue, then the doctrine of constitutional doubt compels this Court to conclude that state courts are not required to ignore state law.

1. The Doctrine of Constitutional Doubt Requires This Court to Reject an Interpretation That Raises Grave Constitutional Questions.

"The doctrine of constitutional doubt" requires this Court "to interpret statutes, if possible, in such fashion as

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[32] However, a foreign national whose Treaty claim is barred by state law theoretically could seek relief by seeking an "original" writ of habeas corpus in this Court. *See* Sup. Ct. R. 20.4. *See also Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) ("The [*Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, 110 Stat. 1217 (1996)] does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."); *Id.* at 666. (Stevens, J., joined by Souter & Breyer, J.J., concurring) ("As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus.").

to avoid grave constitutional questions." *Federal Election Comm'n v. Akins,* 524 U.S. 11, 32 (1998). Thus, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" then this Court is "obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr,* 533 U.S. 289, 299-300 (2001). *See also Ashwander v. TVA,* 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring); *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909). Since the interpretation urged by Bustillo – that the *VCCR* requires state courts to ignore state law – raises grave constitutional questions, this Court must reject that interpretation and accept an interpretation that avoids the difficult constitutional issues.

2. Any Interpretation of the *VCCR* That Requires State Courts to Ignore State Law Raises Grave Constitutional Questions.

A treaty may not violate the constitutional principles of dual sovereignty. However, requiring state courts to ignore state law would violate those principles.

a. A Treaty May Not Violate the Constitutional Principles of Dual Sovereignty.

The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton,* 514 U.S.

779, 838 (1995) (Kennedy, J., concurring).[33] By dividing sovereignty between the National Government and the States, the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51* at 291 (James Madison).[34] *See also The Federalist No. 28* at 149 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").[35] Thus, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the

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[33] Justice Kennedy's idea of dividing power between dual sovereigns rests on a solid historical foundation. As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 Alfred H. Kelly, Winfred A. Harbison, & Herman Belz, *The American Constitution: Its Origins and Development* 46-49 (7th ed. 1991).

[34] Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. *See Declaration of Independence* ("these United colonies are and of right ought to be free and independent states"). Each individual State retained the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Indeed, the Articles of Confederation explicitly recognized that each State "retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Articles of Confederation*, art. II. In sum, before the ratification of the United States Constitution, the States were sovereign entities. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

[35] Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999).

National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). This division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). It "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The division of power between *dual sovereigns*, the States and the National Government, is reflected throughout the Constitution's text, *see Printz v. United States*, 521 U.S. 898, 919 (1997), as well as its structure. *See Alden v. Maine*, 527 U.S. 706, 714-15 (1999). *See also* U.S. Const. amend X. (If a sovereign power is not explicitly given to the National Government, the sovereign power is reserved to the States or to the People.) "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), this Court has intervened to maintain the sovereign prerogatives

of both the States and the National Government.[36] In order to preserve the sovereignty of the National Government, this Court has prevented the States from imposing term limits on members of Congress, *U.S. Term Limits*, 514 U.S. at 800-01, and instructing members of Congress as to how to vote on certain issues, *Cook v. Gralike*, 531 U.S. 510, 519-22, (2001). Similarly, it has invalidated state laws that infringe on the right to travel, *Saenz v. Roe,* 526 U.S. 489 (1999), that undermine the Nation's foreign policy, *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372-74 (2000), and that exempt a State from generally applicable regulations of interstate commerce. *Reno v. Condon,* 528 U.S. 141, 150 (2000). Conversely, recognizing that "the erosion of state sovereignty is likely to occur a step at a time," *South Carolina v. Baker,* 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting), this Court has declared that the National Government may not compel the States to pass particular legislation, *New York,* 505 U.S. at 162, require state officials to enforce federal law, *Printz*, 521 U.S. at 935, dictate the location of the State Capitol, *Coyle v.*

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[36] Moreover, this Court has reinforced the division of power among the Sovereigns by insisting that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (clear statement required to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

Smith, 221 U.S. 559, 579 (1911), or regulate purely local matters. *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Lopez*, 514 U.S. at 561 n.3. *Cf. Gonzales*, 126 S. Ct. at ___ (National Attorney General may not shift "authority from the States to the Federal Government to define general standards of medical practice in every locality."). Similarly, this Court has restricted Congress' power to enforce the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), and its ability to abrogate the States' sovereign immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). Indeed, in some circumstances, the States' sovereignty interest will preclude federal courts from enjoining on-going violations of federal law. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286-87 (1997).

These constitutional principles of dual sovereignty are equally applicable when the President negotiates and the Senate ratifies a treaty. *See Reid v. Covert*, 354 U.S. 1, 17 (1957) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."). *See also* Michael D. Ramsey, *The Treaty Clause* in *The Heritage Guide to the Constitution* 205, 207 (Edwin Meese III, Matthew Spalding, & David Forte, eds., 2005) ("A treaty presumably cannot alter the constitutional structure of government. . . ."). Quite simply, the National Government "is one of limited powers" and its authority cannot be "enlarged under the treaty-making power." *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836). Consequently, "the treaty power should be subject to the same federalism limitations that apply to Congress's legislative powers.

[The National Government] should not be able to use the treaty power (or executive agreement power) to create domestic law that could not be created by Congress." Curtis A. Bradley, *The Treaty Power & American Federalism*, 97 Mich. L. Rev. 390, 451 (1997) (parenthetical original). *See also id.* at 456 ("Under this approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress's legislative powers, such as the legislation at issue in the recent *New York*, *Lopez*, *Boerne*, and *Printz* decisions."). *Cf.* Ramsey, *supra*, at 207 ("The revival of interest in federalism limits on Congress in such areas as sovereign immunity and the Tenth Amendment raises the question of whether these limits also apply to the treaty power . . . ").

Put another way, the President and the Senate cannot circumvent the limitations on the powers of the National Government simply by negotiating and ratifying a treaty. *See Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."). *See also Federal Republic of Germany*, 526 U.S. at 112 (expressing doubt that the President can prevent a State from executing a foreign national unless that foreign national is a diplomat). For example, because the States

are immune from intellectual property claims, *see Florida Prepaid Postsecondary Education Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999), no treaty could require the States to waive their sovereign immunity for intellectual property claims. *See College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin."). As noted above, no treaty could require the States to move their state capitol, *Coyle*, 221 U.S. at 579, to allow international entities to regulate purely local matters, *Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 561 n.3, to use state officials to enforce international law, *Printz*, 521 U.S. at 935, or force the States to pass specific legislation, *New York*, 505 U.S. at 162.

Missouri v. Holland, 252 U.S. 416 (1920), does not command a different result. *Holland* did not hold that the National Government could expand its powers vis-à-vis the States by entering into treaties with foreign nations. *Cf. Commonwealth v. Tasmania*, (1982) 158 C.L.R. 1 (Austl.) (National Government of Australia can expand its powers vis-à-vis the Australian States by entering into treaties.); *Canada v. Ontario*, [1937] A.C. 326, 354 (P.C.) (appeal taken from Can.) (National Government of Canada cannot expand its powers vis-à-vis the Provinces by entering into treaties.). Indeed, this Court limited its decision in *Holland* by stating that "[w]e do not mean to imply that there are no qualifications to the treaty-making power," *Holland*, 252 U.S. at 433. Rather, *Holland* simply held that there are some actions that

the National Government can take pursuant to the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, that it cannot take pursuant to the Commerce Clause, U.S. Const. art. I § 8, cl. 3.[37] In other words, the Treaty Clause confers a different (and in some cases broader) power than that conferred pursuant to the Commerce Clause. *See* Bradley, *supra,* at 426. *See also* C.M. Micou, Comment, *The Treaty Making Power and the Constitution*, 6 Cornell L.Q. 91, 95 (1921) (offering a similar interpretation of *Holland*). While this interpretation of *Holland* still results in a broad Treaty Clause power for the National Government, it also preserves the constitutional principles of dual sovereignty as a substantive limitation on the Treaty Clause. *See* Charles Cooper, *Reserved Powers of the States* in *The Heritage Guide to the Constitution* 371, 374 (Edwin Meese III, Matthew Spalding, & David Forte, eds., 2005) ("Even if modern developments permit (or require) expansion of congressional authority well beyond its eighteenth century limits, such expansion cannot extinguish the 'retained' role of the states as limited but independent sovereigns.").

b. Requiring State Courts To Ignore State Law Would Contradict the Constitutional Principles of Dual Sovereignty.

Any interpretation of the *VCCR* that requires state courts to ignore state law whenever a *VCCR* claim is raised would contradict constitutional principles of dual

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[37] Moreover, because the treaty in *Holland* was to be enforced by a *federal* game warden, there was no issue that state game wardens were improperly commandeered to implement the treaty. *Holland*, 252 U.S. at 431.

sovereignty.[38] First, requiring state courts to ignore state law would interfere with the States' sovereign powers.[39] Second, requiring state courts to ignore state law would allow the National Government to use the Treaty Clause to commandeer the state courts.

i. Requiring State Courts to Ignore State Law Would Interfere with the States' Sovereign Powers.

Any interpretation of the *VCCR* that requires state courts to ignore state law would "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Coleman*, 501 U.S. at 748. Because the "States possess primary authority for defining and enforcing the criminal law," *Engle v.*

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[38] Similarly, any interpretation of the *VCCR* that would require state *law enforcement officials* to take affirmative steps to implement the *VCCR* raises grave constitutional questions. In our constitutional system, the National Government may not force state officials to enforce federal law. *See Printz*, 521 U.S. at 925-33 (1997). First, requiring state officials to enforce federal law offends the principles of dual sovereignty. *Id.* at 919-22. Second, requiring state officials to enforce federal law violates the principles of separation of powers because it intrudes on the President's prerogatives. *Id.* at 922-25. If state law enforcement officials cannot be compelled to enforce federal statutes, then surely they cannot be compelled to enforce federal treaties.

[39] Moreover, to the extent that such an interpretation of the *VCCR* would require that federal or state courts hear *VCCR* claims brought by a foreign nation against a State, such an interpretation would violate sovereign immunity. *See Monaco*, 292 U.S. at 329-30 (States' sovereign immunity bars suit by foreign nation.). *See also Federal Republic of Germany*, 526 U.S. at 112 (National Government's sovereign immunity bars suit by foreign nation based on the *VCCR*). If Congress may not use its Article I powers to abrogate sovereign immunity, *Seminole Tribe*, 517 U.S. at 72, then the President and the Senate cannot use the Treaty Clause to effectively abrogate sovereign immunity.

Isaac, 456 U.S. 107, 128 (1982), this Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Coleman*, 501 U.S. at 726. *See also McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to State that results through reexamination of a state conviction on a ground that the state did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments."). Thus, if a state court concludes that habeas relief is barred by *state* law, then federal courts will not review that judgment. *See Wainwright*, 433 U.S. at 81. "The rule applies with equal force whether the state-law ground is substantive or procedural." *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Moreover, the rule applies even where a *constitutional* claim is involved. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (claims based on *Miranda v. Arizona*, 384 U.S. 436, (1966)); *Wainwright*, 433 U.S. at 87-88 (voluntariness claims). Indeed, when a state court denies habeas relief based on state law, this Court lacks "jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory."[40] *Lambrix*, 520 U.S. at 523.

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[40] Of course, when a state prisoner files a habeas petition in a federal district court, there is a different rationale for deferring to state court's interpretation of state law. "The 'independent and adequate state ground' doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to [the federal habeas corpus statute] since the federal court is not formally reviewing a judgment, but is determining whether the

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See also Sochor v. Florida, 504 U.S. 527, 533-34 (1992); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Yet, if the *VCCR* were interpreted to require state courts to ignore state law when a prisoner makes a Treaty claim, these principles would become meaningless. The sweeping aside of all "procedural defaults" as the International Court of Justice Court broadly defined them, *see Avena*, 2004 I.C.J. at ¶ 111, would constitute an unprecedented and extremely disruptive intrusion into the States' sovereignty. State courts routinely review issues rooted in federal statutory or constitutional law and do so using their own rules of adjudication. Rules of procedural default are critical to ensuring the orderly administration of justice. For example, the Virginia law procedural bar at issue here, *Slayton*, provides that as a matter of state law, a trial court might commit error by "permitting inquiry" on a question that could have been raised at trial and pursued on appeal.[41] *Slayton*, 205 S.E.2d at 682. "Because allegations of trial court error are *not cognizable* by habeas corpus, habeas cannot be used as a substitute for an

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prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." *Lambrix*, 520 U.S. at 523. In that situation, "[a]pplication of the 'independent and adequate state ground' doctrine to federal habeas review is based upon equitable considerations of federalism and comity. It 'ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.'" *Id.*

[41] There is no doubt that *Slayton* is an adequate state bar to federal habeas review. *See Wright v. Angelone*, 151 F.3d 151, 159-60 (4th Cir. 1998). *See also Smith v. Murray*, 477 U.S. 527, 533 (1986) (acknowledging Virginia's application of *Slayton* bar).

appeal." *Dodson v. Director,* 355 S.E.2d 573, 575 n.4 (Va. 1987).[42]

Under Bustillo's view, this Court would have to dictate to a state court the scope it should attribute to an extraordinary writ under state law. Moreover, when a *VCCR* issue is present, this Court and the lower federal courts could no longer respect the States' sovereign interests or state court determinations of state law. The federal issues – whether the treaty has been violated and, if so, whether the violation warrants habeas relief – would be reached even though there is an independent and adequate state law ground for denying habeas relief. Indeed, claims based on the Treaty will be treated *more favorably* than claims based on the Constitution. A constitutional claim would still be subject to state procedural default rules, *Ylst*, 501 U.S. at 801, but a *VCCR* claim would not.[43] An interpretation that subordinates the States' sovereign interests and elevates a mere treaty over the Constitution should be rejected.

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[42] Of course, *Slayton* is analogous to federal law. *See Sunal v. Large*, 332 U.S. 174, 178 (1947) ("[T]he writ of habeas corpus will not be allowed to do service for an appeal.").

[43] The opportunities for the disruption of the orderly processes of justice that would follow from this Court's adoption of the *Avena* holding are all too obvious. The eleventh hour appeals in *Breard*, 523 U.S. at 379 and *Federal Republic of Germany*, 526 U.S. at 112, demonstrate the potential for disruption. If this Court were to adopt *Avena*, *VCCR* claims could be raised in any state court, at any time, regardless of whether the petitioner pled guilty. *See Miles v. Sheriff of Virginia Beach City Jail*, 581 S.E.2d 191, 193 (Va. 2003) (voluntary plea of guilty "waives all non-jurisdictional defects that occurred prior to entry of the guilty plea."). Moreover, *VCCR* claims could be filed at any time – regardless of whether the claim was timely or could have been previously raised – whereas claims rooted in our fundamental charter of government could be defaulted. Neither the text nor the legislative history indicates that the Executive Branch or Congress intended such a perplexing and unprecedented intrusion into a core function of state government.

ii. Requiring State Courts to Ignore State Law Would Allow the National Government to Use the Treaty Clause to Commandeer the State Courts.

Any interpretation of the *VCCR* that requires state courts to ignore state law would allow the National Government to use the Treaty Clause to commandeer the States – specifically the state courts. In our system of dual sovereignty, the National Government may not direct the States to pass legislation, *New York*, 505 U.S. at 176 or use state officials to enforce federal law, *Printz*, 521 U.S. at 933. While Congress may require state courts of "adequate and appropriate" jurisdiction, *Testa v. Katt*, 330 U.S. 386, 394 (1947), "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," *Printz*, 521 U.S. at 907, Congress may not "pursue federal objectives through the state judiciaries," *Alden*, 527 U.S. at 753. "A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.* at 749. Thus, the Constitution

> recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the

> authority of the state and, to that extent, a denial of its independence.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938).

Yet, if the *VCCR* were found to require state courts to ignore state law, then the *VCCR* effectively would allow the National Government – using the Treaty Clause – to commandeer the state courts. Requiring state courts to ignore state law is essentially the same as telling a State that it must adopt a specific law or a specific set of court rules. *Cf. New York*, 505 U.S. at 176 (Congress may not direct States to pass legislation). Moreover, requiring the state judiciary to hear Treaty claims and then to issue writs of habeas corpus against the state executive branch is essentially the same as pressing state courts into federal service to coerce the State. *Alden*, 527 U.S. at 749. The constitutional prohibition on commandeering cannot be circumvented by the Treaty Clause.

"The 'dual sovereignty' of our national and state governments is a novel experiment. But like many ingenious and complex innovations, it is a fragile one." Sandra Day O'Connor, *The Majesty of the Law* 56 (paperback ed. 2004). "If there is any danger, it lies in the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." Laurence Tribe, *American Constitutional Law* 381 (2nd ed. 1988). Any interpretation of the *VCCR* requiring state courts to ignore state law contradicts the constitutional principles of dual sovereignty and thus, at a minimum, raises grave constitutional concerns.[44] Therefore, under the Doctrine of Constitutional

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[44] Moreover, where – as here – this Court is reviewing a state court decision that rests on an adequate and independent state ground, such an

(Continued on following page)

Doubt, any such interpretation should be rejected. Accordingly, Bustillo is not entitled to habeas relief.[45]

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interpretation of the *VCCR* raises grave constitutional questions concerning the limits on this Court's jurisdiction. This Court lacks jurisdiction to render advisory opinions. *See Sochor,* 504 U.S. at 533-34 and n.*. Consequently, this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman,* 501 U.S. at 729. "Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix,* 520 U.S. at 523. Yet, if the *VCCR* requires state courts to ignore state law, then this Court will be reviewing state court decisions that – but for the *VCCR* – would rest on adequate and independent state grounds.

[45] If this Court concludes that the *VCCR* does create individual rights that are judicially enforceable and that the *VCCR* requires state court to ignore state law, then Bustillo is not necessarily entitled to relief. Indeed, Bustillo can obtain relief only if he demonstrates that Virginia's failure to follow the *VCCR* had a prejudicial effect on his trial. *See Breard,* 523 U.S. at 376-77; *Arizona v. Fulimante,* 499 U.S. 279, 295-96 (1991). *Cf. Avena,* 2004 I.C.J. ¶ 120.

Bustillo was not prejudiced. First, he claims that he could have obtained a photograph of Sirena from Honduras, and this would have assisted witnesses in identifying Sirena. However, these witnesses knew both Bustillo and Sirena. It is difficult to see why they needed a photograph to make an identification. *Bustillo Br.* at 48. Moreover, these witnesses gave conflicting statements to the police and to trial counsel, who made a tactical decision not to call them.

Second, although the police had a nickname rather than a full name, it was uncontested at trial that "Sirena" was a real person, that he was at the crime scene, and that he could not be found shortly after the attack. Furthermore, under the facts of the case, Sirena would have been liable under Virginia law as a principal in the second degree. *See Moehring v. Virginia,* 290 S.E.2d 891, 892 (Va. 1982) ("A principal in the second degree is one who is not only present at a crime's commission, but one who also commits some overt act, such as inciting, encouraging, advising, or assisting in the commission of the crime or shares the perpetrator's criminal intent."). "[A] principal in the second degree may be indicted, tried, convicted, and punished in all respects as if a principal in the first degree." *Taylor v. Virginia,* 537 S.E.2d 592, 594 (Va. 2000). Therefore, Sirena's flight is hardly surprising.

(Continued on following page)

CONCLUSION

The judgment of the Supreme Court of Virginia should be **AFFIRMED**.

Respectfully submitted,

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Third, Bustillo also claims that the Honduran government might have questioned Sirena. *Bustillo Br.* at 49. This assertion is pure speculation. Bustillo has offered no evidence obtained from Sirena by the Honduran police. As to Sirena's purported confession, obtained by a gang member from a gang member, for the benefit of an incarcerated gang member, it is inadmissible as unreliable hearsay. In cases such as *Chambers v. Mississippi*, 410 U.S. 284, 287-89 (1973) and *Hines v. Virginia*, 117 S.E. 843, 845 (Va. 1923), the third party confessions were all attended by circumstances that strongly suggested the reliability of the confession: the confession was made repeatedly to neutral witnesses who were available to testify. Not only is Sirena's purported confession devoid of any such indicia of reliability, but in addition the record in this case is rife with evidence of witness manipulation and intimidation by Bustillo's father or members of his gang. Tr. 3/18/98 at 149-50; Tr. 7/31/98 at 180-82; Tr. 12/5/02 at 85.

However, because Virginia law barred both the trial court and the Supreme Court of Virginia from considering his *VCCR* claim, there has been no judicial assessment as to whether Bustillo was prejudiced. Thus, if Bustillo prevails on *both* questions, the proper response from this Court is to remand the matter for further proceedings.

No. 05-51

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

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I. Article 36 Creates Enforceable, Individual Rights

No one disputes that, when determining whether Article 36 creates individual rights, "[t]he clear import of treaty language controls." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). Here, the treaty's text is unequivocal. Article 36 provides that "authorities [of the receiving State] *shall* inform [the detainee] of *his rights* under [Article 36(1)]." Vienna Conv. art. 36(1)(b) (emphasis added). And it declares that a receiving State's laws "must enable full effect to be given to the purposes for which the *rights* accorded under this Article are intended." *Id.* art. 36(2) (emphasis added). The Commonwealth thus concedes (Br. 14) that "Article 36 * * * discusses a 'right' of access to consular officials," and the United States acknowledges (Br. 16) that Article 36 "refers to the detainee's 'rights.'" That language is reinforced by Article 36's drafting history; by the United States' repeatedly expressed (but now conveniently ignored) view that Article 36 creates individual rights; and by the considered and persuasive views of other signatories and the international tribunal entrusted with the Convention's construction.

A. There Is No Presumption Against The Recognition Of Individual Rights Under Treaties

1. Hoping to minimize the import of the treaty's text, its *travaux préparatoires*, and the signatories' post-ratification conduct, the Commonwealth and the United States insist there is a "long-established presumption" against the recognition and judicial enforcement of individual treaty rights. U.S. Br. 11; see Resp. Br. 12-13. Respondent thus declares (Br. 12-13) that any "ambiguity in the treaty * * * is resolved by the customary presumption against the creation of treaty-based individual rights." Even if such a presumption exists—and, as explained below, it does not—a presumption cannot make the treaty's reference to "rights" mean something else, nor can it overcome other indicia of the treaty's meaning. In any event, this Court's cases refute respondent's proposed presumption: The "long-established" rule is that, "'where * * * a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more

liberal interpretation is to be preferred.'" *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 163 (1940)).

The *Head Money Cases*, 112 U.S. 580 (1884), are not to the contrary. Those cases do state that "'[a] treaty is primarily a compact between independent nations,'" and they note that treaty violations may become the "'subject of international negotiations and reclamations.'" Resp. Br. 12, 24; U.S. Br. 11. But those cases establish no *interpretive* presumption against private rights. To the contrary, they recognize:

> [W]henever [a treaty's] provisions prescribe a rule by which the rights of the private citizen or subject may be determined[, and] when such rights are of a nature to be enforced in a court of justice, [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases, 112 U.S. at 598-599.

The Restatement (Third) of Foreign Relations Law (1987) provides even less support for the proposed presumption. It does observe that "'[i]nternational agreements * * * generally do not create private rights.'" Resp. Br. 11; U.S. Br. 12 (quoting 2 Restatement § 907, cmt. a, at 395). But that does not create a presumption. In fact, the commentary continues: "Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement." 2 Restatement § 907, cmt. a, at 395. Respondent and the United States, moreover, elevate the commentary over § 907's *text*, which says that "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States." *Id.* § 907(1), at 395.[1]

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[1] Nor do other decisions of this Court (see U.S. Br. 11) support a presumption. *Charlton* v. *Kelly*, 229 U.S. 447, 450, 475-476 (1913), addressed the scope of federal "habeas corpus," not treaty rights; *Whitney* v. *Robertson*, 124 U.S. 190, 193-194 (1888), held that a subsequent federal statute superseded an earlier treaty; and *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829), held that the Court would not resolve a dispute "between two nations

2. In their haste to assemble a presumption, the Commonwealth and its *amici* also conflate two analytically distinct issues. The question here is whether the treaty creates an individual right for detained foreign nationals, not, as they suggest (Resp. Br. 15; U.S. Br. 12), whether it creates a private *cause of action*. In this case, the cause of action—the mechanism by which Bustillo asserts the violation of his rights in court—is provided by Virginia's habeas corpus statute, Va. Code Ann. § 8.01-654. That statute allows suit by those claiming to be "detained without lawful authority," including any challenge to a "conviction or sentence." Petitioner in No. 04-10566, Moises Sanchez-Llamas, need not show that he has a cause of action; he asserts his rights defensively in a criminal prosecution brought by the State. In both cases, petitioners do not claim that the Vienna Convention creates a cause of action. They claim merely that the treaty supplies "a rule of decision for * * * case[s]" that are otherwise properly before the courts. *Head Money Cases*, 112 U.S. at 599.

Respondent thus errs in suggesting (Br. 15) that relief is unavailable unless Article 36 "creates a judicially cognizable cause of action." Prisoners seeking federal habeas relief based on a constitutional violation do not need to prove that the Constitution creates a "private right of action." The federal habeas statutes, 28 U.S.C. §§ 2254 & 2255, supply the cause of action. Nor do plaintiffs suing under 42 U.S.C. § 1983 need to show that the violated statute or the Constitution creates a private cause of action. Section 1983 provides that. See *Gonzaga* v. *Doe*, 536 U.S. 273, 284 (2002). ("[Section 1983 plaintiffs] do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights * * * ."). Likewise here, Bustillo need not

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concerning a national boundary" under a treaty that was not self-executing, *id.* at 314-315. The proffered lower-court cases, Resp. Br. 12-13 & n.13; U.S. Br. 11-12, are also unpersuasive. The supposed presumption in those cases originates in *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965 (4th Cir. 1992). But *Goldstar* did not hold that there is a presumption *against* recognizing and enforcing individual treaty rights. It observed only that there was no presumption *in favor* of individual rights. *Id.* at 968.

show that the treaty creates a cause of action or provides for a "domestic judicial remedy." Resp. Br. 21. The Virginia habeas statute does that.

For the same reason, the United States' reliance on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), is misplaced. While the United States claims that *Amerada Hess* "held that two conventions did not create judicially enforceable rights for ship owners," Br. 12; see Resp. Br. 16, that description is incomplete. The issue was not whether the treaties at issue created *individual rights* (or whether the nature of the rights rendered them incapable of enforcement). It was whether the treaties created *causes of action* for foreign corporations. Because the corporations could not assert treaty violations under causes of action created by other statutes (such as habeas or § 1983), they were forced to argue that the treaty itself created a federal cause of action for damages. 488 U.S. at 442. Relying on sovereign immunity principles, this Court held that the treaties "'do not create *private rights of action* for foreign corporations to recover compensation from foreign states in United States courts.'" U.S. Br. 12 (quoting 488 U.S. at 443) (emphasis added). That holding has no bearing where, as here, a statute (the Virginia habeas statute) creates the cause of action being invoked.[2]

The United States likewise errs in citing *Johnson* v. *Eisentrager*, 339 U.S. 769 (1950), for the proposition that the "protections of the [Geneva Convention] are not judicially enforceable." U.S. Br. 12. In that case, this Court did not hold that the *rights* being asserted were, by their nature, incapable of judicial enforcement. The Court held that, regardless of the right at issue, the writ of habeas corpus—the *cause of action* through which German prisoners sought to assert putative treaty rights—was not available to "an enemy alien who, at no

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[2] The United States' and respondent's attempt to distinguish individual rights from "judicially enforceable individual rights," U.S. Br. 11; see *id.* at 17; Resp. Br. 19, reflects the same confusion. If the treaty gives the individual a right, that right can be asserted as a rule of decision in any matter otherwise properly before the court.

relevant time and in no stage of his captivity, has been within [the United States'] territorial jurisdiction." 339 U.S. at 768. This Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), confirms that reading of *Eisentrager*. See 542 U.S. at 478-479 & n.8; *id.* at 493 (Scalia, J., dissenting). Here, there is no doubt that the Virginia habeas statute extends to prisoners held by Virginia in the Commonwealth itself.

The controlling principles here come from *United States* v. *Jung Ah Lung*, 124 U.S. 621, 632-633 (1888), which respondent and its *amici* simply ignore. In that case, the treaty did not provide a private "right of action" to sue in federal court. In fact, "the treaty itself contemplate[d] only executive action." *Id.* at 632. But that did not stop this Court from enforcing the treaty rights through the writ of habeas corpus. *Id.* at 627-628. Likewise, so long as the Vienna Convention creates individual rights, the Virginia habeas statute provides Bustillo with a cause of action to assert their violation.[3]

3. Ultimately, the United States is reduced to arguing that, although this Court has consistently enforced treaty rights, see, *e.g.*, Pet. Br. 18-19 & n.3, such enforcement is limited to treaties that "guarantee * * * freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property."

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[3] Respondent now asserts (Br. 25-27) that, just as some *statutory* violations do not warrant *federal* habeas relief, some *treaty* claims do not warrant *state* habeas relief. But the Commonwealth never raised that issue below or in its brief in opposition; accordingly, it is waived. *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985). In any event, the limit respondent cites is derived from *federal* habeas principles and has been applied only to federal habeas petitions, as respondent concedes. Br. 26 n.24; *Reed* v. *Farley*, 512 U.S. 339, 349-355 (1994). Respondent makes no effort to explain why that federal standard should govern state habeas cases. The rule is also limited to "technical error[s]" where the petitioner "suffered no prejudice." 512 U.S. at 352, 355. It does not apply where, as here, the violation likely resulted in the conviction of an innocent man. Pet. Br. 45-50; n.13, *infra*. Respondent's invocation of *Teague* v. *Lane*, 489 U.S. 288 (1989), is similarly flawed. As we explained at the petition stage, respondent waived *Teague* by failing to raise it below, and *Teague* does not apply to state habeas claims in any event. Pet. Cert. Reply at 3-7. Respondent does not even hazard a response.

U.S. Br. 13. It is difficult to imagine how an alien's right to be a pawnbroker, *Asakura* v. *Seattle*, 265 U.S. 332 (1924), or to avoid cancellation of a debt owed to him, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796), is more "peculiarly private" than the right to seek assistance in a criminal trial in which the alien risks the loss of his liberty in an unfamiliar legal system.[4]

Finally, the United States misguidedly attempts to downplay the significance of the fact that the Vienna Convention is self-executing. Self-executing treaties are "the law of the land" and must be "regarded by the court as an act of congress." *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); Pet. Br. 19-20 & n.5. Consequently, the Vienna Convention is not self-executing solely in the sense "that government officials *can* provide foreign nationals with information about consular assistance * * * without the need for implementing legislation." U.S. Br. 14 (emphasis added). Because the Vienna Convention is self-executing, government officials *must* comply with the Convention's requirement that they inform foreign nationals of their right to consular notification, and failure to do so violates supreme federal law.

B. Article 36 Unequivocally Creates Individual Rights

Although "[t]he clear import of [the] treaty language controls," *Sumitomo Shoji Am.*, 457 U.S. at 180, respondent and his *amici* pay scant attention to Article 36's text. That is no surprise. Article 36 expressly refers to "rights" and states that the rights belong to the foreign national. In the words of the treaty, the rights are "his rights."

1. Conceding that Article 36 "discusses a 'right' of access to consular officials," respondent argues that "this reference merely reflects the creation of *rights among the signatory*

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[4] The United States also attempts to confine this Court's enforcement of individual treaty rights in *United States* v. *Rauscher*, 119 U.S. 407 (1886), and *Johnson* v. *Browne*, 205 U.S. 309 (1907), to "specialty rules in extradition treaties." U.S. Br. 14. But *Rauscher* and *Browne* affirm a more expansive view. The treaties in those cases did *not* expressly incorporate the rule of specialty. *Browne*, 205 U.S. at 317. Rather, this Court *implied* the rule from the "scope and object of the treaty," allowing defendants to invoke the implied right in their defense. *Rauscher*, 119 U.S. at 422.

nations." Br. 14. But that ignores the text of Article 36(1)(a), which first addresses the duties owed to consular officials and then declares that *"[n]ationals of the sending State shall have the same freedom* with respect to communication with and access to consular officers." It likewise ignores Article 36(1)(b), which provides that the detaining State's "authorities shall inform the [foreign national] without delay of *his* rights." Art. 36(1)(b) (emphasis added). The text of Article 36 creates rights in the individual *along with* rights in the States.

Acknowledging that Article 36 "refers to the detainee's 'rights,'" the United States urges that "the 'rights' enumerated in Article 36(1)(b) do not encompass notice to the detainee; the provision places only a *duty* on the receiving State to give notice." U.S. Br. 16-17. This Court has long held, however, that "rights and duties are correlative," *Ullman* v. *United States*, 350 U.S. 422, 427 n.2 (1956)—*i.e.*, "[t]he existence of [a] duty on the part of the government necessarily implies a corresponding right of the [individual] to be so protected." *Logan* v. *United States*, 144 U.S. 263, 284 (1892). Accordingly, this Court has repeatedly recognized an individual right where, as in Article 36(1)(b), the text states that the government "shall" treat a specific class of persons in a specified manner. *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979).

Respondent and the United States also argue that the explicit rights-creating language in Article 36(1) is vitiated by an introductory clause, which states that the rights are provided "[w]ith a view to facilitating the exercise of consular functions." Resp. Br. 14; U.S. Br. 19. But they do not explain how granting rights to foreign nationals is inconsistent with facilitating consular functions. To the contrary, requiring a foreign national to be notified of his right to consular access increases the likelihood that the consul will be contacted, and thus able to perform his duties. A "consul's duties * * * could not be carried out effectively unless his right of access to his nationals, *and the right of those nationals of access to him*, were safeguarded." Summary Records of the 535th Meeting, 1 Y.B. Int'l Law Comm'n, U.N. Doc. A/CN.4/SER.A/1960, at 49 ¶ 7 ("ILC Records") (emphasis added).

Reliance on the treaty's preamble, Resp. Br. 13-14; see U.S. Br. 19, is likewise unpersuasive. As noted above, "ensur[ing] the efficient performance of functions by consular posts" is not inconsistent with an individual right to notification. The Commonwealth never addresses the U.S. delegation's report, which explains that the preamble merely emphasizes that the "privileges and immunities are granted for governmental reasons, rather than for the benefit of officers, members of families, and employees, as individuals." Report of the United States Delegation to the Conference on Consular Relations ("U.S. Delegation Report"), S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 46; Pet. Br. 33. It does not explain why the preamble necessarily encompasses the "rights" the Convention accords foreign nationals. Pet. Br. 33. Nor does it explain why this Court should look to the preamble at all, when the text of Article 36 is unambiguous. Pet. Br. 32.

2. Respondent's construction is also inconsistent with Article 36's *travaux préparatoires*. Neither respondent nor the United States disputes that the delegates specifically debated whether Article 36 should create individual rights (see Pet. Br. 24-27) and ultimately adopted a text that explicitly "refers to the detainee's 'rights.'" U.S. Br. 16.

The United States asserts that, although the treaty uses the term "right," it was not intended to create "an individual right that can be privately enforced through judicial process." Br. 17. The United States claims that Sir Gerald Fitzmaurice "warned" other delegates that "'[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue.'" *Ibid.* (quoting ILC Records at 49 ¶ 8). But Sir Fitzmaurice went on to say that "the object of his proposal was to ensure that *an alien had equal rights with a national's* in the circumstances covered by the text," ILC Records at 49 ¶ 8 (emphasis added), and that the way to do that was to "safeguard[ ]" "the *right of those [foreign] nationals* of access" to their consuls, *id.* at 49 ¶ 7 (emphasis added). Read as a whole, the records reveal that the driving factor behind Article 36(1)(b) was, as the U.S. delegate explained at the time, "the rights of the national concerned."

U.N. Conf. on Consular Relations: Official Records, U.N. Doc. A/Conf./25/16, U.N. Sales No. 63.X.2 (1963), at 338 ¶ 11.[5]

Finally, respondent and the United States argue that, in ratifying the Convention, "the Senate did not intend to create any individual rights." Resp. Br. 18; see U.S. Br. 22. But they rely exclusively on an executive summary, which states that "[t]he Convention does not change or affect U.S. laws or practice." S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2 (1969). But the summary also states that, "[w]here uniformity or specific rules did not previously exist, the Convention breaks new ground and sets minimum standards." *Id.* at 1. More important, that three-page summary of the 79-article treaty does not purport to address the question of individual rights and refers readers to the "detailed analysis" in the U.S. Delegation Report. *Ibid.* That report (at 60) repeatedly declares that the Convention requires "authorities of the receiving State to inform the person detained of *his right* to have the fact of his detention reported to the consular post * * * and of *his right* to communicate with the consular post."

3. Respondent and the United States contend that this Court should not recognize individual rights under Article 36 because "[t]he Executive Branch has *never* construed the *VCCR*" to create such a right. Resp. Br. 17; see U.S. Br. 23. But they overlook the State Department's instructions for domestic law enforcement and the Foreign Affairs Manual, both of which specifically refer to the arrestee's "right[s]." Pet. Br. 28. They likewise ignore the Attorney General's representation to Mexico that a foreign national "is free to argue in the trial court that his rights under Article 36 of the Vienna Convention were violated." *Id.* at 29 (quoting Letter From Attorney General John Ashcroft at 2 (June 3, 2004)).

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[5] The United States recognizes that the Convention allows the detained individual to decide whether consular notification occurs. See Pet. 23, 26. But the United States claims the purpose of that provision was to "to lessen the burden on * * * the receiving States." Br. 18. The drafting history, however, makes clear that the primary reason was to give the foreign national control over notification, underscoring the fact that the rights belong primarily to the detained national and not his country of origin. Pet. Br. 26.

Indeed, when the rights of *Americans* abroad were at issue, the United States forcefully argued that "Article 36 *establishes rights* not only for the consular officer but, *perhaps even more importantly, for the nationals of the sending State.*" Memorial of the United States, *United States Diplomatic & Consular Staff in Tehran (U.S.* v. *Iran)*, 1980 I.C.J. Pleadings at 174 (emphasis added). This Court should look to the practical construction the Executive has given to Article 36, not to more recent "litigating positions." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).[6]

4. "[S]ubsequent interpretations of the signatories" also may "clarify [a treaty's] meaning." *Air France* v. *Saks*, 470 U.S. 392, 403 (1985). Here, dozens of signatories agree that the Convention creates individual rights. Pet. Br. 29. Respondent nonetheless asserts that "there is a striking lack of judicial decisions holding that the Treaty creates individual rights." Resp. Br. 18; see U.S. Br. 26-27. But it is no less "striking" that the respondent cites only three foreign court decisions that allegedly support its view. None of those cases, however, actually resolves the individual rights issue; and none is from a nation's highest court.[7] More striking still, the

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[6] The United States argues that the State Department's "longstanding practice has been to investigate" Convention violations and to "extend a formal apology" for violations. U.S. Br. 24. But this Court has held that the availability of diplomatic "remedies" does not preclude an individual from enforcing his treaty rights in court. *Jung Ah Lung*, 124 U.S. at 632-633; *Rauscher*, 119 U.S. at 431; p. 5, *supra*. Likewise, it is hard to see how reading the Convention in accord with its text could interfere with the United States' "ability to effectuate treaty obligations and speak with one voice." U.S. Br. 16; see Resp. Br. 17. It cannot possibly jeopardize international relations to require Virginia—under the Supremacy Clause—to honor the United States' obligations. Indeed, the Framers chose to make treaties part of the "supreme Law of the Land," allowing "judges of the United States * * * to carry [them] into effect," to "show the world that we make faith of treaties." Pet. Br. 17 n.2; see Pet. Br. at 16-17.

[7] In *Canada* v. *Van Bergen*, [2000] 261 A.R. 387 ¶ 15 (Alta. Crim. App. (Can.)), the "Minister did consider this [Article 36] argument under her general discretion and found that there was * * * no proven prejudice." In *R.* v. *Partak*, [2001] 160 C.C.C. (3d) 553 ¶¶ 25, 63 (Ont. Sup. Ct. of Justice (Can.)), the court assumed that Article 36(1)(b) *does* create individual rights,

United States cannot identify any other signatory whose executive denies the existence of individual rights. Respondent and the United States thus argue that the United States Executive Branch's interpretation of the treaty deserves weight, while claiming that the uniform interpretation of the executives of dozens of other signatories deserves none.

The ICJ, moreover, has interpreted Article 36 to create individual rights. See *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).[8] Because the ICJ has been granted authority to interpret the Convention, its views are entitled to "respectful consideration." *Breard* v. *Greene*, 523 U.S. 371, 375 (1998). To be sure, the United States has "no obligation to accept the reasoning underlying the ICJ's judgments." U.S. Br. 30. But if this Court truly is to give "respectful consideration" to the ICJ's interpretation of Article 36, it should not diverge from the ICJ's construction without ample reason. Neither respondent nor the United States has demonstrated that the ICJ's interpretation is illogical or unreasonable. Accordingly, *LaGrand* and *Avena* must be given due weight.

II. Article 36 Requires States To Afford Foreign Nationals A Meaningful Opportunity To Assert Treaty Violations

Respondent concedes that, although Article 36(1)(b) expressly declares that state officials "shall notify" a detained foreign national of "his rights" to consular notification and access, Virginia officials never so advised Bustillo. As a result, Bustillo first learned of his rights under the Vienna Convention after his trial. Upon discovering the violation, Bustillo's

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but denied relief for lack of prejudice. Finally, in *R.* v. *Abbrederis*, [1981] 51 F.L.R. 99, 115 (N.S.W. Crim. App. (Austl.)), the court held only that suppression of evidence was inappropriate in the context of a border interrogation by customs agents.

[8] The United States claims *LaGrand* did "not state that Article 36 gives a foreign national a domestically enforceable private right." U.S. Br. 29. But the United States ignores *Avena*, which held that Article 36 creates rights in foreign nationals, and that such rights "are to be asserted * * * within the domestic legal system of the United States." 2004 I.C.J. at 35-36 ¶ 40.

new counsel moved (unsuccessfully) to remand the case to the trial court so he could develop the record. The Commonwealth's position boils down to the assertion that it may avoid review of an acknowledged treaty violation even though the defendant's failure to raise the issue earlier itself resulted from the treaty violation. That position defies common sense and is inconsistent with the Convention's requirements.

A. State Procedural Bars May Not Preclude A Meaningful Opportunity To Assert Treaty Rights

Article 36(1)(b) provides that any signatory detaining a foreign national "shall notify" the detained individual of his rights to consular notification and access. The reason for the notification requirement is self-evident: The treaty "presume[s] that most foreign nationals" are "unaware of the provisions of the Vienna Convention" and that, as a result, its protections would often be meaningless absent express notification. *Torres* v. *Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J., respecting denial of certiorari). In this case, it is undisputed that, because of Virginia's violation of the treaty, Bustillo did not know of his treaty rights (much less that his rights were violated) until after his trial had concluded. Requiring Bustillo to raise the violation before he learned of his rights, and enforcing a default that was itself a result of the treaty violation, would rob the notification requirement of effect. A treaty, no less than a statute, should not be given a "construction * * * [that] would defeat its purpose." *Browder* v. *Director, Ill. Dep't of Corr.*, 434 U.S. 257, 264 (1978). Moreover, Article 36(2) expressly requires that domestic laws "enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Requiring a foreign national to assert rights of which the treaty presumes him to be unaware gives virtually no "effect" to those rights.

1. The Commonwealth asserts that Article 36(2) has nothing to do with *judicial* rules, even those that wholly frustrate a foreign national's Article 36 rights. Instead, the Commonwealth reads Article 36(2) to mean only that "a nation may not impose unreasonably restrictive visitation hours * * * or impose other measures that would restrict the 'exercise' of

the rights." Br. 32-33. Respondent nowhere explains how the word "exercise" can be defined to *include* logistical details but to *exclude* judicial redress or enforcement of treaty rights. This Court has already recognized that seeking judicial relief is one way to "exercise" Vienna Convention rights. See *Breard*, 523 U.S. at 377 ("By not asserting his [treaty] claim in state court, Breard failed to *exercise* his rights under the Vienna Convention * * * .") (emphasis added).[9]

Respondent likewise errs in claiming (Br. 30 n.28) that "nothing in the" Convention's "*travaux préparatoires*" suggests that Article 36 may sometimes require States to set aside inconsistent procedural rules. Concerned that Article 36(2)'s "full effect" clause "might force States to alter their *criminal laws* and regulations," 1 U.N. Official Records, *supra*, at 40 ¶ 4 (emphasis added), the Soviet Union proposed amending that clause to declare that "said laws and regulations [of the receiving State] must not nullify these rights," 2 U.N. Official Records, *supra*, at 168. The United Kingdom opposed the amendment because "it meant that the laws and regulations of the receiving State would govern" unless they "render[ed] [Article 36] rights completely inoperative * * * . But rights could be seriously impaired without becoming completely inoperative." 1 U.N. Official Records, *supra*, at 40 ¶ 6. The Convention's drafters thus chose to reject the proposed amendment and to displace local laws where their enforcement is inconsistent with the treaty's central objectives.

The statement by a State Department official that the "'Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing

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[9] Respondent's reading of Article 36(2) would also confine Article 36's statement that "rights * * * shall be exercised in conformity with the laws and regulations of the receiving State" to ministerial issues such as visiting hours. *Breard* is to the contrary. 523 U.S. at 375-376 (requirement of "exercise[] in conformity" with local laws may encompass contemporaneous objection rule). Respondent cannot simultaneously maintain that Article 36(2)'s requirement that rights be "exercised" in conformity with local laws validates procedural bar rules, but that the requirement that such local laws give "full effect" to the treaty extends only to "restrictive visitation hours."

consular conventions,'" U.S. Br. 22 (quoting S. Exec. Rep. No. 9, *supra*, at 18); see Resp. Br. 17 & n.17, is not to the contrary. The official explained that "[m]any of the articles in the Vienna Convention * * * require * * * compliance with the laws and regulations of the receiving State," but he immediately clarified that, "[t]o the extent that there *are* conflicts with Federal legislation or State laws[,] *the Vienna Convention * * * would govern*." S. Exec. Rep. No. 9, *supra*, at 18 (emphasis added); see also p. 9, *supra*.

In any event, when the treaty was ratified in 1969, state procedural bar rules were rarely invoked to prevent relief. Indeed, the case upon which the Commonwealth relies as establishing the procedural bar invoked here—*Slayton* v. *Parrigan*, 205 S.E.2d 680 (Va. 1974)—was decided five years later. Moreover, at the time of ratification, the federal habeas corpus statute was almost always available to raise federal claims notwithstanding procedural defaults. See *Fay* v. *Noia*, 372 U.S. 391, 434 (1963) ("[F]ederal courts [may] grant habeas relief to an applicant whose federal claims would not be heard on direct review in this Court because of a procedural default furnishing an adequate and independent ground of state decision."). The federal cases adopting a more restrictive approach, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 86-88 (1977), post-date the Convention by nearly a decade. The State Department thus had little reason to mention that procedural default rules might give way in some cases.

2. Respondent also makes no effort to explain how the asserted procedural bar would allow foreign nationals who are not notified (or otherwise aware) of their Article 36 rights to develop an adequate record for direct review. "'Rules of procedure should * * * induce litigants to present their contentions to the right tribunals at the right time.'" *Massaro* v. *United States*, 538 U.S. 500, 504 (2003) (quoting *Guinan* v. *United States*, 6 F.3d 468, 474 (7th Cir. 1993) (Easterbrook, J., concurring)). To that end, *Massaro* held that claims of ineffective assistance of federal trial counsel need not be raised on direct appeal because the "trial record" would often be "incomplete or inadequate for this purpose," *id.* at 504-505,

creating the risk that "[e]ven meritorious claims would fail," *id.* at 506. For similar reasons, *Brady* claims need not be raised until the defendant becomes aware that exculpatory evidence was withheld.

The same is true here. A foreign national who has not been notified of his Article 36 rights often will not be in a position to determine (much less to establish to a court's satisfaction) that the violation "had an effect on [his] trial." *Breard*, 523 U.S. at 377; Pet. Br. 40-42. Establishing prejudice often requires an investigation of the assistance the consulate could have provided. In this case, Bustillo first learned of the treaty violation while his case was pending on direct appeal and unsuccessfully sought a remand to the trial court to develop the necessary record. See Pet. Br. 8-9, 41. Respondent nowhere addresses how foreign nationals can build a record before they are aware of the rights in question or can determine the impact consular assistance would have had.

To be sure, there will be instances where the defendant can and perhaps *must* raise the violation before trial—such as where the defendant actually learns of his rights from another source. In those cases, the violation will often be harmless, or it may be possible to cure any prejudice before trial (through a continuance or otherwise). But where state officials, by neglect or design, keep the detainee unaware of his rights, they should not be permitted to capitalize on that ignorance and the resulting default to preclude assertion of the treaty claim.[10]

B. The Treaty Does Not Permit Responsibility To Be Shifted To The Foreign National's Lawyer

Much of the Commonwealth's argument attempts to shift responsibility for advising defendants of their treaty rights to

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[10] The United States attempts to distinguish *Massaro* by positing that "it would be far better to litigate the question of a violation at trial, when a continuance would allow a (belatedly informed) consulate to provide any assistance it might be willing to offer." U.S. Br. 47. But Bustillo was not notified of his Vienna Convention rights—nor was his consulate informed of his detention—before trial. The United States also recites portions of *Massaro* and asserts that "[n]one of those considerations applies to consular notification claims," *ibid.*, but makes no attempt to explain why that is so.

counsel. "Expecting an effective counsel to recognize and consider raising a Treaty claim at trial," respondent asserts (Br. 33), "is no different than expecting an effective counsel to recognize and consider raising a constitutional claim at trial." Respondent ignores the fact that—unlike most federal statutory and constitutional provisions—Article 36 expressly requires *state officials* directly to notify *the foreign national* of his rights on the assumption that the detainee's ignorance will otherwise deprive the rights of meaning.

The treaty's text requires a "competent authorit[y] of the receiving State"—*e.g.*, arresting officer, magistrate, prosecutor, or judge—to provide notification. Vienna Convention art. 36(1)(b). It does not permit that burden to be shifted or excused because the foreign national has a lawyer, and with good reason: The role and reliability of lawyers varies widely among signatory nations. Indeed, the State Department instructs consular officers "to gain prompt personal access to an arrested U.S. citizen" abroad to offer "information concerning local legal aid before the arrestee selects a lawyer who may prove to be a charlatan." U.S. Dep't of State Foreign Affairs Manual, 7 FAM 420 (2004). If a lawyer's failure to assert a treaty claim were always a basis for default—even where the defendant himself has no knowledge of his treaty rights—thousands of Americans abroad will be placed in the hands of foreign lawyers who, according to the State Department, may be "charlatan[s]." For that reason, the Convention requires the *State* to provide *notice to the detainee himself.*

The United States' effort to analogize Vienna Convention violations to the omission of warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is likewise inapt. It may be permissible to "rely[] on counsel to raise * * * claims * * * that the government failed to provide a detainee with" *Miranda* warnings, Br. 47-48, since such issues arise only in our legal system. But the Convention must be enforced and have effect even in those countries that lack a tradition of zealous and competent legal representation. For that reason, it places the burden of implementation and enforcement on "competent authorities" of the receiving State, not the alien or his counsel.

More fundamentally, *Miranda* is wholly unlike the Vienna Convention in two respects. *First*, the warnings required by *Miranda* are not focused solely on informing the "woefully ignorant" of their rights. 384 U.S. at 468. *Miranda*'s "[m]ore important" purpose is to "dispel the compelling atmosphere of the interrogation." *Id.* at 465. *Miranda* warnings are thus required regardless of "age, education, intelligence, or prior contact with authorities," because "a warning at the time of the interrogation is indispensable to overcome its pressures." Indeed, warnings are required even though *Miranda* is now "part of our national culture," *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000), and virtually no one who has watched television or read a newspaper could be ignorant of those rights. See *United States* v. *Espinosa-Orlando*, 704 F.2d 507, 514 (11th Cir. 1983) (warnings required even if a suspect knows his *Miranda* rights). The individual and his lawyer will be aware of *Miranda*. As a result, they can be expected to raise the violation when the warning is omitted.

Article 36's direct notification requirement, by contrast, reflects the all-too-accurate "presum[ption] that most foreign nationals"—often poor and uneducated—are "unaware of the provisions of the Vienna Convention." *Torres*, 124 S. Ct. at 919 (Stevens, J., respecting denial of certiorari).[11] Unlike *Miranda* warnings, the sole and indispensable function of the Article 36 notification requirement is to provide information without which the detained individual will not know of, and cannot exercise, his rights. For that reason, unlike *Miranda* violations, Vienna Convention violations may be harmless if the individual actually learns of his rights by other means. But, for the same reason, where the State's error keeps the detainee ignorant of his rights, he cannot be expected to assert them before trial.

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[11] See U.S. Census Bureau, Current Population Survey, Annual Social and Econ. Supp., 2003 (avail. at http://www.census.gov/population/socdemo/foreign/ppl-174/tab01-05.pdf) (27% of foreign nationals age 25 and over have less than a 9th grade education, and 40% never completed high school).

Second, it makes sense to apply a strict default rule to *Miranda* claims because the *factual* predicate for the claim exists and is known to the defendant before trial. Even assuming an individual defendant is unaware of *Miranda*, he and his lawyer undoubtedly will be aware that he has made incriminating statements and will thus have an incentive to seek their exclusion. That most often will not be the case under the Vienna Convention, because neither the detained foreign national nor his lawyer will know whether consular assistance was available or would have yielded fruit.

C. *Breard* v. *Greene* Does Not Control This Case

Contrary to respondent's suggestion, Br. 30-31; see U.S. Br. 42-43, this Court's *per curiam* decision in *Breard* v. *Greene*, 523 U.S. 371 (1998), does not control whether a state procedural bar is always sufficient to defeat review of a Vienna Convention claim, for three reasons.

First, *Breard* acknowledged that this Court "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. Since *Breard* was decided, the ICJ—after extensive briefing, argument, and consideration—has twice held that Article 36(2)'s "full effect" clause may require a State to set aside a procedural bar where the State "failed to carry out its [notification] obligation under the Convention." *LaGrand*, 2001 I.C.J. at 488, 497-498, ¶¶ 60, 91; *Avena*, 2004 I.C.J. at 56-57, ¶¶ 112-114.[12]

Second, *Breard*'s discussion of state procedural bars was unnecessary to the decision. Neither respondent nor the United States denies that, in *Breard*, the Vienna Convention claim was foreclosed by AEDPA's restrictive *federal* default rules for *federal* habeas claims. That "subsequently enacted"

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[12] The United States suggests *LaGrand* and *Avena* are irrelevant because, when *Breard* was decided, the ICJ had requested that the execution be stayed during the ICJ's proceedings. U.S. Br. 43 n.16. But the ICJ's provisional order did not "in any way prejudge findings the Court might make on the merits." *Case Concerning the Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, 1998 I.C.J. 99 ¶ 40.

federal statute trumped the treaty. 523 U.S. at 376; Pet. Br. 45. Because this case arises on state habeas, AEDPA does not apply. Moreover, *state* rules (whenever promulgated) can never overcome the requirements of a *federal* treaty.

Third, "in the past the Court has revisited its interpretation of a treaty when new international law has come to light." *Medellín* v. *Dretke*, 125 S. Ct. 2088, 2105 (2005) (O'Connor, J., dissenting). It should feel even "less constrained to follow precedent" here, given that *Breard* was a *per curiam* opinion rendered under exigent circumstances, without the benefit of full briefing and argument. *Hohn* v. *United States*, 524 U.S. 236, 251 (1998); see *Breard*, 523 U.S. at 379-380 (Stevens, J., dissenting); Br. *Amici Curiae* Honduras, *et al.*, 22-24.[13] Particularly given the intervening ICJ decisions and the views of dozens of signatories, Pet. Br. 20-31, *Breard* cannot be considered controlling.

D. The Supremacy Clause Controls This Case

Finally, the Commonwealth argues that setting aside a state procedural bar when it conflicts with a federal treaty would render principles of federalism "meaningless." Br. 45. Not so. Whatever the scope of "the States' sovereign powers,"

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[13] *Breard* also rested on the conclusion the petitioner could not have made the requisite "showing that the * * * violation * * * had an effect on the trial." 523 U.S. at 377. The exact opposite is true here. Pet. Br. 46-50. Here, the violation prevented Bustillo from establishing the existence of the alternative suspect (Sirena), J.A. 32, his presence at the crime scene, J.A. 61, 65, 98, 100, 106, and his flight to Honduras the day after the victim died, J.A. 73-74. When shown a photograph of Sirena obtained from the Honduran consulate, numerous eyewitnesses identified Sirena as the assailant. J.A. 61, 65, 98, 100, 106. Likewise, there is no dispute that, with consular assistance, Sirena's precise identity could have been determined, resulting in a timely request for and production of other exculpatory evidence from the police, including documents showing that Sirena was stopped by police near the crime scene shortly after the killing with red stains on his clothes; that Sirena lied to police about where he had been; and that an eyewitness saw Sirena approach the victim with a bat "cocked." Pet. Br. 49. Moreover, once Bustillo's counsel located Sirena in Honduras, he was able to obtain a videotape of Sirena admitting that he had killed the victim and that Bustillo was wrongly convicted. J.A. 33-55. This case does not require the least bit of speculation as to the impact of the Vienna Convention violation.

Resp. Br. 43, the Supremacy Clause expressly subordinates state laws to federal treaties. The Commonwealth nowhere mentions the Supremacy Clause. Nor does it confront evidence that the States' "constant tendency * * * to violate national Treaties" was precisely why the Framers made treaties, along with other federal laws, the "supreme law of the land." Pet. Br. 16-17 (quoting 1 The Records of the Federal Convention of 1787 (Max Farrand ed., rev. ed. 1966), at 164 (statement of James Madison)).

The Commonwealth also suggests (Br. 47) that enforcing federal treaties impermissibly "commandeer[s] the States—specifically the state courts." But this Court has long held that, where state "courts have jurisdiction adequate and appropriate under established local law to adjudicate" a federal claim, they "are not free to refuse enforcement" of that claim. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947); see *Printz* v. *United States*, 521 U.S. 898, 928 (1997). *Alden* v. *Maine*, 527 U.S. 706 (1999), does not hold otherwise. *Alden* addressed the States' *sovereign immunity* from damages actions in state court and, in fact, reaffirmed *Testa*'s rule that "Congress may declare federal law binding and enforceable in state courts." 527 U.S. at 752. The United States certainly does not share respondent's view. Just last Term, the President "directed the States to take actions to implement the *Avena* decision," U.S. Br. 44, notwithstanding state procedural bars. That order is most easily upheld as directing state courts to comply with the requirements of Article 36 itself.[14]

CONCLUSION

For the foregoing reasons and those set forth in petitioner's opening brief, the judgment of the Supreme Court of Virginia should be reversed.

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[14] The United States suggests the directive to state courts "was based on the President's constitutionally based foreign affairs power * * * and other treaties and statutes," *not* the Vienna Convention. U.S. Br. 44. The contortions necessary to avoid relying on the most obvious source of federal power—Article 36—raise far more constitutional questions than they resolve. See V. Jackson, *World Habeas Corpus*, 91 Cornell L. Rev. 303, 357-358 & nn. 306-312 (2006); Pet. Br. 44.

Respectfully submitted.

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Nos. 05-51 and 04-10566

In the Supreme Court of the United States

MARIO A. BUSTILLO, PETITIONER

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

MOISES SANCHEZ-LLAMAS, PETITIONER

v.

STATE OF OREGON

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA
AND THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292, 294, creates individual rights that may be judicially enforced in a criminal case at the behest of a criminal defendant (Nos. 04-10566 & 05-51).

2. Whether a violation of Article 36's requirement that a detained foreign national be advised of his rights to have consular officials informed of his detention and to communicate with the consular post requires the suppression of a detainee's statements to the police (No. 04-10566).

3. Whether state courts may preclude a defendant from raising a claim under Article 36 based on the defendant's procedural default in failing to raise the claim at trial (No. 05-51).

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No. 05-51

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04-10566

MOISES SANCHEZ-LLAMAS, PETITIONER

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case involves the questions whether Article 36 of the Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, 21 U.S.T. 77, 100-101, 596 U.N.T.S. 261, 292, 294, creates individual rights that may be judicially enforced in a criminal case at the behest of a criminal defendant, and, if so, whether a violation of Article 36's requirement that a detained foreign national be advised of his rights to have consular officials informed of his detention and to communicate with the consular post requires the suppression of a detainee's statements to the police, and whether a State's ordinary principles of waiver and procedural default may preclude a defendant from raising a claim under Article 36 based on the

defendant's failure to raise the claim at trial. The United States has a substantial interest in the interpretation and effect that courts in the United States give to international instruments to which it is a party and therefore has a considerable interest in the resolution of this case. The United States has participated in previous cases raising similar questions. See, *e.g.*, *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (per curiam); *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam).

STATEMENT

1. The Vienna Convention

In 1969, with the advice and consent of the Senate, see 115 Cong. Rec. 30,997, the United States ratified the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. at 100-101, 596 U.N.T.S. at 292, 294, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36 provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." *Id.*, art. 36(1)(a).

Article 36 further provides that "[i]f [a foreign detainee] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Vienna Convention, art. 36(1)(b). In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

Article 36 also provides that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with

him and to arrange for his legal representation." Vienna Convention, art. 36(1)(c). It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2). That requirement is "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

At the time the United States ratified the Vienna Convention, it also ratified an Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, 21 U.S.T. 77, 325, 596 U.N.T.S. 487. Parties to the Optional Protocol may submit "[d]isputes arising out of the interpretation or application of the Convention" for resolution by the International Court of Justice (ICJ). Optional Protocol, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Like all decisions of the ICJ, however, decisions in cases submitted to the ICJ under the Optional Protocol have "no binding force except between the parties and in respect of that particular case," Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 1062. On March 7, 2005, the United States noticed its withdrawal from the Optional Protocol. See *Medellin* v. *Dretke*, 125 S. Ct. 2088, 2101 (2005) (O'Connor, J., dissenting).

2. State Court Proceedings

a. *Bustillo, No. 05-51.* (1) On the night of December 10, 1997, James Merry was struck in the head by a young man wielding a baseball bat while standing outside a Popeyes Res-

taurant in Springfield, Virginia. Merry later died as a result of his injuries. Based on the statements of several witnesses to the attack, Bustillo, a Honduran national, was arrested and charged with murder. 05-51 Pet. App. 39a; 05-51 Br. in Opp. 4. The arresting authorities did not inform Bustillo that he could have the Honduran consulate informed of his detention if he so desired. 05-51 Br. in Opp. 4.

At trial, several prosecution witnesses identified Bustillo as the one who struck Merry with the bat. One of the witnesses knew Bustillo from classes they had together at school; the others separately identified him from a photo spread. Shortly before the attack, Bustillo and other members of his street gang had confronted Merry inside the restaurant while he was eating dinner with the three individuals who later identified Bustillo as Merry's killer. The witnesses recalled that Merry's attacker had been wearing a red shirt, as had Bustillo that evening. 05-51 Pet. App. 39a; 05-551 Br. in Opp. 2-5.

The defense's theory was that Merry's attacker was another individual known as "Sirena." A member of Bustillo's gang stated that he saw a man he knew as "Julio" or "Sirena" approach Merry and strike him with a bat, and a woman who was standing next to Merry when he was struck testified that Bustillo was not the assailant although she did not know who the attacker was. 05-51 Pet. App. 31a-32a. Another witness testified that she had seen "Sirena," whose last name she did not know, on a plane to Honduras the day after Merry died. 05-51 J.A. 205. The jury found Bustillo guilty of first-degree murder, and he was sentenced to imprisonment for a term of 30 years. 05-51 Pet. App. 19a.

(2) Bustillo, who was represented by counsel, did not object at trial that the State had failed to inform him that he could contact his consulate, nor did he raise the issue in his post-trial motion to set aside the jury's verdict or on appeal. 05-51 Pet. App. 47a. On direct review, Virginia's intermediate appellate court affirmed Bustillo's conviction and sentence,

Bustillo v. *Commonwealth*, No. 2321-98-4, 2000 WL 365930 (Va. Ct. App. Apr. 11, 2000) (unpublished), and the Supreme Court of Virginia refused a petition for further appeal, J.A. 9. This Court denied Bustillo's petition for certiorari. *Bustillo* v. *Virginia*, 532 U.S. 1072 (2001).

Following direct review, Bustillo petitioned for state habeas corpus relief, alleging for the first time that his right to consular notification under the Vienna Convention had been violated and that he was entitled to reversal of his conviction as a result. 05-51 Pet. App. 40a. Alternatively, Bustillo argued that his retained trial counsel was ineffective in failing to advise Bustillo of his right to consult with the Honduran consulate. *Id.* at 47a. The state habeas court denied Bustillo's Vienna Convention claim without addressing the merits. The court ruled that the claim was procedurally barred by Bustillo's failure to assert it "during trial and through the appellate process." *Id.* at 43a. The court also held that Bustillo's Vienna Convention-based ineffectiveness claim was procedurally barred. *Id.* at 47a. The habeas court granted Bustillo an evidentiary hearing on the separate question whether the prosecutor failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). 05-51 Pet. App. at 48a. Although the court found that the evidence was exculpatory, *id.* at 34a-35a, it determined, after a second hearing, that Bustillo's defense had not been prejudiced and denied the habeas petition, *id.* at 15a-16a.

The Supreme Court of Virginia refused a petition for appeal, ruling that Bustillo had not properly perfected his appeal with respect to the *Brady* claim and that "there is no reversible error" with respect to the Vienna Convention claim. 05-51 Pet. App. 1a; 05-51 Br. in Opp. 11. This Court granted certiorari limited to the Vienna Convention issue. See 126 S. Ct. 621 (2005).

b. *Sanchez-Llamas, No. 04-10566.* (1) Sanchez-Llamas, a Mexican national, was arrested in December 1999 after an exchange of gunfire with police officers, in which he wounded

one officer in the leg. 04-10566 Pet. App. 15. Shortly after Sanchez-Llamas's arrest, officers apprised him in both English and Spanish of his *Miranda* rights, which he waived. *Id.* at 15 & n.2. The officers did not additionally inform Sanchez-Llamas that he could request that the Mexican consulate be notified of his detention. *Ibid.* During questioning, Sanchez-Llamas made incriminating statements. *Id.* at 16. He was thereafter charged with attempted murder, attempted aggravated murder, and various other crimes. *Ibid.*

Before trial, Sanchez-Llamas moved to suppress evidence of his post-arrest statements on the ground that he "was not advised of his right to consult with the Mexican Counsel." 04-10566 Pet. App. 3. The trial court denied Sanchez-Llamas's suppression motion, ruling that a violation of the Vienna Convention does not require the suppression of the defendant's incriminating statements as a remedy. *Id.* at 10. Sanchez-Llamas was thereafter convicted of 11 felony counts and sentenced to imprisonment for 246 months. *Id.* at 16.

(2) The Oregon Supreme Court affirmed. In rejecting Sanchez-Llamas's Vienna Convention claim, the court recognized "the general rule * * * that rights created by international treaties belong to the signatory state and are *not* enforceable in American courts by private individuals," absent "a specific intent to create such [enforceable] individual rights [that] can be discerned from the treaty as a whole." 04-10566 Pet. App. 18. Although "Article 36 expressly refers to the detained foreign national's 'rights' to consular access and notification," the court stated that Article 36's "mere use of the term 'rights' cannot, by itself, support an intent to require signatory states to allow individual detainees to enforce those 'rights' in a criminal proceeding against them—particularly when the treaty does not specify the nature of the declared 'rights' or any remedy that is required for their breach." *Id.* at 20-21. The Oregon Supreme Court found it more likely that the Convention's drafters had used the phrase informing a prisoner of his "rights" as a shorthand "way of describing

what [information] a receiving signatory state must tell a foreign detainee." *Id.* at 21. This interpretation was bolstered, the court continued, by language in both the treaty's preamble and Article 36's introductory clause suggesting that "the treaty and Article 36 are concerned with relationships and obligations among *nations*, not with individual rights." *Ibid.*

Absent any "clear intention" that would negate the general presumption against enforcement of treaty provisions by private individuals, the Oregon Supreme Court concluded "that the obligations that Article 36 describes are enforceable only by the affected signatory states and not by individual detainees." 04-10566 Pet. App. 22. The court therefore rejected Sanchez-Llamas's claim that his statements should be suppressed as a consequence of the Vienna Convention violation. *Id.* at 22-23. The Oregon Supreme Court declined, as a matter of discretion, to address Sanchez-Llamas's claim that the waiver of his *Miranda* rights was not voluntary. *Id.* at 15 n.2. This Court granted a petition for certiorari on the questions whether the Vienna Convention confers an individually enforceable right and, if so, whether suppression is the proper remedy for such a violation. See 126 S. Ct. 621 (2005).

SUMMARY OF ARGUMENT

1. Article 36 of the Vienna Convention on Consular Relations does not create an individually enforceable right that a criminal defendant may assert to attack his conviction and sentence or to suppress evidence. Article 36 requires parties to the Convention to notify a detained foreign national that he may request consular assistance. But the text does not authorize private enforcement of that provision in court. It has long been established that, absent a clear indication to the contrary, an international treaty is addressed solely to the rights of States and not private individuals; that is particularly true of a treaty that bears on sovereign conduct and the relations between States. The Vienna Convention reflects that understanding in express terms in its preamble, and

again in Article 36, by confirming that the Convention is intended to facilitate the provision of consular services, not to create individual rights. Nothing in the Vienna Convention's text or history overrides that understanding or justifies recognizing a novel, judicially enforceable right of an individual to assert a violation of Article 36 in a criminal prosecution.

Any suggestion that the parties to the Convention intended, by its adoption, to create such a judicially enforceable individual right is contradicted by the historical context in which the Vienna Convention was approved, as well as by the 40 years of practice under it. Neither petitioners nor their amici offer a single unambiguous example in the 40-year history of the Vienna Convention from any of its 161 parties of an individual defendant being afforded a remedy in his criminal case on the basis of a Vienna Convention violation. And the Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. That clearly expressed view of the Executive Branch on the meaning of a treaty "is entitled to great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989) (quoting *Sumitomo Shojo Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)).

Against all of that, the reasoning of the International Court of Justice in *Avena and other Mexican Nationals (Mexico* v. *United States)* (*Avena*), 2004 I.C.J. 12 (Mar. 31), that the Vienna Convention creates judicially enforceable individual rights should, after "respectful consideration," *Breard* v. *Greene*, 523 U.S. 371, 375 (1998) (per curiam), be rejected. The United States is obligated to comply with the judgment in that case, and the President has acted to ensure such compliance. But the United States has no obligation to accept the reasoning underlying that judgment, or to apply it in other cases. The ICJ's reasoning in *Avena* lacks sufficient support in the basic rules of treaty interpretation and contradicts the intention and practice of the parties to the Convention. The responsibility for interpreting the Convention as a

matter of United States law rests with this Court and with the Executive Branch, whose views are due great deference, and the relevant legal principles and evidence establish that the ICJ's interpretation is incorrect.

2. Even assuming that a receiving State's failure to comply with the Convention's consular notification provisions could give rise to an individually enforceable right, suppression in state court of a detainee's voluntary confession, given after a valid waiver of *Miranda* rights, would not be an appropriate remedy. The Court has no authority to impose an exclusionary rule on the States as an exercise of the Court's supervisory authority. *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000). Because there is no assertion that the Constitution or a federal statute mandates a suppression remedy, if this Court is to require exclusion of evidence as a remedy for a State's violation of Article 36, that rule must be found in the Vienna Convention itself.

There is nothing in the text or history of the Vienna Convention to suggest that its drafters intended suppression of statements made by a foreign national who was not told that he could request consular notification. Indeed, the idea that the drafters would have envisioned suppression of a voluntary confession as a remedy is difficult to square with the fact that, in most nations, the exclusionary rule had not taken root at the time of the Convention's drafting (and, indeed, still has not). Even considering United States practice in particular, the Vienna Convention was drafted years before this Court decided *Miranda* v. *Arizona*, 384 U.S. 436 (1966)—and the Convention was ratified in this country shortly after Congress attempted to overrule *Miranda*. Any suggestion that the Convention implies a suppression remedy because it serves to protect the effective exercise of a detainee's right against self-incrimination cannot withstand scrutiny. Quite apart from the absence of a textual foundation for that position, in many countries, consular officials—and in some countries even the detainee's lawyers—would not be allowed access to a detainee

until after the preliminary period of interrogation is concluded. The drafters, therefore, cannot have had an implicit understanding that the admissibility of a confession would be tied to full compliance with Article 36(1)(a).

3. Finally, even assuming that the Vienna Convention conferred individual rights that are enforceable by defendants in criminal proceedings, nothing in the Convention precludes a State from requiring, as a matter of its procedural rules, that a claimed violation of Article 36 be raised before or during trial. "[R]ights" under Article 36 "shall be exercised in conformity with the laws and regulations of the receiving State," and this Court held in *Breard* that procedural default rules do not prevent "full effect to be given to the purposes for which [Article 36 rights] are intended," as Article 36(2) provides. 523 U.S. at 375. A procedural-default rule does not prevent the purposes of Article 36 from receiving "full effect," any more than it denies full effect to constitutional guarantees that are likewise subject to default. While the President has determined that the United States will comply with the *Avena* judgment by reviewing and reconsidering the convictions and sentences of the 51 Mexican nationals covered by it, notwithstanding state procedural default rules, there is no obligation to accept the ICJ's interpretation of Article 36(2) with respect to other cases, and the Executive Branch does not.

Practical and policy reasons provide no basis for allowing Article 36 claims to be raised on collateral review even if not preserved at trial. Unlike a claim of ineffective assistance of counsel, cf. *Massaro* v. *United States*, 538 U.S. 500 (2003), trial counsel can readily recognize and seek a remedy for Vienna Convention violations, just as counsel does for *Miranda* violations and a host of other claims. The absence of notice to the defendant does not preclude counsel from recognizing a possible legal claim (as the preserved claim in No. 04-10566 demonstrates). And requiring adjudication of Vienna Convention claims at trial would ensure that they could be redressed

in a timely fashion, without the need to upset a final verdict and require a new trial.

ARGUMENT

THE VIENNA CONVENTION DOES NOT PROVIDE A BASIS ON WHICH PETITIONERS MAY CHALLENGE THEIR CRIMINAL CONVICTIONS

I. ARTICLE 36 DOES NOT CONFER INDIVIDUALLY ENFORCEABLE RIGHTS

A. Treaties Are Presumed To Be Enforceable By States, Not By Individuals, Absent A Clear Indication To The Contrary

It is a long-established presumption that treaties and other international agreements do not create judicially enforceable individual rights. As this Court stated in the *Head Money Cases*, 112 U.S. 580 (1884), "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.* at 598. When a treaty violation nonetheless occurs, it "becomes the subject of international negotiations and reclamations," not judicial redress. *Ibid.* See *Charlton* v. *Kelly*, 229 U.S. 447, 474 (1913); *Whitney* v. *Robertson*, 124 U.S. 190, 195 (1888) (issues of compliance with treaty obligations are "not judicial questions"; rather, "the power to determine these matters ha[s] not been confided to the judiciary * * * but to the executive and legislative departments of our government; * * * they belong to diplomacy and legislation, and not to the administration of the laws"); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829).

Treaties can, and on occasion do, create judicially enforceable private rights. But since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States* v. *Emuegbunam*, 268

F.3d 377, 389-390 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002); *United States* v. *Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir.), cert. denied, 533 U.S. 962 (2001); *United States* v. *De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United States* v. *Li*, 206 F.3d 56, 61 (1st Cir.), cert. denied, 531 U.S. 956 (2000). That background principle applies even when a treaty benefits private individuals. "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." 2 Restatement (Third) of the Foreign Relations Law of the United States (Restatement (Third) of Foreign Relations) § 907 cmt. a, at 395 (1987).

For example, in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court held that two conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship "shall be compensated for any loss or damage" in certain circumstances, and the other specified that "[a] belligerent shall indemnify the damage caused by its violation." *Id.* at 442 & n.10 (citations omitted). The Court explained that the conventions "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." *Id.* at 442. Even though the agreements referred to "compensation" for the private party and a State's obligation to "indemnify," that language did not overcome the presumption against treaties creating privately enforceable rights: "They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Ibid.* See *Johnson* v. *Eisentrager*, 339 U.S. 769, 789 & n.14 (1950) (protections of the Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 U.N.T.S. 343, are not judicially enforceable). Like the agreements at issue in *Amerada Hess*, Article 36 may benefit a detained foreign national, but it does not give that individual a private right to challenge his conviction and sentence based on an alleged denial of consular information. See *Jimenez-*

Nava, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394; see also *De La Pava*, 268 F.3d at 163-165; *Li*, 206 F.3d at 66-68 (Selya, J. and Boudin, C.J., concurring).

The cases petitioners cite (05-51 Pet. Br. 18-19 n. 3; 04-10566 Pet. Br. 30-31 n.11, 33-34 n.13) in which the Court has given effect to self-executing treaty provisions at the behest of private individuals are readily distinguishable from the present context. Most of those cases involve explicit treaty provisions that guarantee to individual aliens freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property on the same basis as United States citizens.[1] In light of the inherently private nature of the rights at issue and the explicit language of the agreements, the courts gave effect to the self-executing treaty provisions over inconsistent state laws. See *Head Money Cases*, 112 U.S. at 598-599 (noting that courts will enforce treaty provisions that "regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property" when these "are of a nature to be enforced in a court of justice"). The affirmative obligation of the receiving State under Article 36 of the Vienna Convention to provide information to detainees—an obligation that, when respected, may still result in the sending State providing no response or assistance whatever to the detainee—is plainly of a different order from the commercial and property rights afforded by those treaties.

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[1] See, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 n.6 (1961) (treaty provision guaranteeing that "[i]n all that concerns the right of acquiring * * * property, * * * Serbian subjects * * * shall enjoy the rights which the respective laws grant * * * the subjects of the most favored nation" preempted Oregon law limiting foreign nationals' right to inherit property); *Asakura* v. *Seattle*, 265 U.S. 332, 340-342 (1924) (bilateral treaty providing that "subjects of [Japan] shall have liberty" to engage in trade "upon the same terms as native citizens" of the United States preempted local ordinance precluding aliens from obtaining a business license); *Jordan* v. *Tashiro*, 278 U.S. 123, 128 (1928) (same).

In other instances, foreign nationals have been allowed to defend against criminal prosecution in light of specialty rules in extradition treaties. See, *e.g.*, *United States* v. *Rauscher*, 119 U.S. 407, 419-424 (1886); *Johnson* v. *Browne*, 205 U.S. 309, 320-321 (1907). As the Court explained in *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992), *Rauscher* and *Browne* applied the rule of specialty "because of the practice of nations with regard to extradition treaties," and "any doubt" concerning a fugitive's ability to seek judicial enforcement of the treaty-conferred rule of specialty "was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party." *Id.* at 660, 667. There is no similar history of enforcement of obligations such as those undertaken in Article 36 and there is no federal statute that purports to make the Article judicially enforceable.

The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 5 (1969). The Vienna Convention is self-executing in the sense that government officials can provide foreign nationals with information about consular assistance and access to consular officers without the need for implementing legislation and can further give effect to provisions that were intended to be judicially enforced, such as those relating to consular privileges and immunities.[2] But it is a separate question

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[2] See, *e.g.*, *Risk* v. *Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention, art. 43(1), 21 U.S.T. at 104, 596 U.N.T.S. at 298, because duties were consular functions), cert. denied, 502 U.S. 1035 (1992); *Gerritsen* v. *de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity). That consular immunity can be judicially enforced is consistent with established law that formed the backdrop for the Vienna Convention. See, *e.g.*, *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 284 (1833); *Wacker* v. *Bisson*, 348

whether Article 36 gives a foreign national an affirmative right to challenge his conviction and sentence on the ground that consular access was denied. 1 Restatement (Third) of Foreign Relations Law § 111 cmt. h, at 47 ("[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). Such an action does not represent simple reliance on a legal protection as a defense, see 04-10566 Pet. Br. 28, but represents an affirmative use of the treaty to upset a final conviction. As discussed below, the available evidence shows that Article 36 does not confer such a right.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the United States could bring an action in court to enforce compliance with a treaty obligation. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue "to carry out treaty obligations to a foreign power"; "The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit."). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need

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F.2d 602, 609 n.19 (5th Cir. 1965); *Sarelas* v. *Rocanas*, 311 F.2d 36, 38 (7th Cir. 1962), cert. denied, 373 U.S. 949 (1963); *Anderson* v. *Villela*, 210 F. Supp. 791, 792 (D. Mass. 1962); *Waltier* v. *Thomson*, 189 F. Supp. 319, 320 (S.D.N.Y. 1960). The Vienna Convention thus did not create consular immunity, but simply carried forward an established understanding. By contrast, there was no established practice that consular notice and access—like that treated in Article 36—could be individually enforced in court. Indeed, there appears to have been no practice in international law before Article 36 of a detainee being allowed to attack a criminal conviction based on any ground related to a failure of consular notification, communication, or access.

for the United States to be able to effectuate treaty obligations and speak with one voice in dealing with foreign nations. See *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414, 424 (2003). No similar principle confers a general right to enforce treaties on private individuals. Moreover, judicial action initiated or supported by the Executive to enforce a treaty obligation or ameliorate a breach is quite different from a recognition of judicially enforceable rights—with attendant potential complications for United States foreign policy—over the objection of the Executive.

B. The Language And Structure Of The Vienna Convention Confirm That It Does Not Create Privately Enforceable Rights

Article 36(1)(b) of the Vienna Convention specifies that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested." 21 U.S.T. at 101, 596 U.N.T.S. at 292. In addition, "[a]ny communication addressed to the consular post by the person arrested, * * * shall also be forwarded * * * without delay." *Ibid.* Finally, "authorities [of the receiving State, *i.e.*, of the United States] shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." *Ibid.*

The only violation of Article 36(1)(b) that petitioners assert is that they were not informed that they could request that their consulates be notified of their detention. Petitioners contend (05-51 Pet. Br. 21-22; 04-10566 Pet. Br. 15-16) that a violation of this obligation infringes an individual right of the detainee, which may be vindicated in court, based in large part on the fact that Article 36(1)(b) refers to the detainee's "rights." Yet, the "rights" enumerated in Article 36(1)(b) do not encompass notice to the detainee; the provision places only a *duty* on the receiving State to give notice to the

detainee about consular access. And the failure to fulfill that duty is the only violation alleged here.[3]

Even where the Convention does use the term "right," that usage does not signify an individual right that can be privately enforced through judicial process. The discussions of the International Law Commission (ILC) in drafting its proposed Article 36 (submitted by the ILC to the United Nations Conference) reflect that the proposal "related to the basic function of the consul to protect his nationals vis-à-vis the local authorities." *Summary Records of the 535th Meeting*, [1960] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1960. The Article's proponent, Sir Gerald Fitzmaurice, specifically warned that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue," *id.* at 49; rather, the procedural provisions of Article 36 "were intended to provide a consul with the means of carrying out the function of protection," *ibid.* See *ibid.* (Mr. Erim agreed "that the proposed new article * * * dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens"). Thus, although the ILC experts referred to "the right of * * * nationals of access to [the consul]," that "right" was in

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[3] Plainly, the receiving State's obligation under Article 36(1)(b) to "inform the person * * * of his rights under this sub-paragraph" refers to the "rights" addressed in the preceding two sentences: (1) to have consular officials of the sending State notified of his detention and (2) to have communications forwarded to the consular post. Neither petitioner maintains that he was affirmatively prevented from having his consul notified or otherwise communicating with his consulate. Petitioners also cite in support of their argument (05-51 Pet. Br. 23; 04-10566 Pet. Br. 15-16) paragraph (2) of Article 36, which provides that "[t]he rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State." Once again, the term "rights" in this sentence does not refer to the receiving State's duty to provide a detainee with information about consular access, which could not in any meaningful sense be "exercise[d]" by the detainee, but instead to the underlying "rights" of notification and communication.

service of the consul's ability to "carr[y] out effectively" his duties. *Ibid.* Indeed, the ILC drafters stated their view that "where a country did not carry out a provision of a convention, it would naturally be estopped from invoking that provision against other participating countries," *ibid.*, an understanding that, whether accurate or not, was clearly at odds with any supposed intent to create an enforceable individual right.

The subsequent debate between governmental delegates to the United Nations Conference convened to negotiate the Convention is to a similar effect. There was some disagreement among the delegates whether Article 36 should require mandatory notification to consular authorities or not require any affirmative step by the receiving State. 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 81-86, 336-340 (1963) (U.N. Official Records). Numerous delegations objected, both in the second committee session and the plenary meeting, to the burden on the receiving State of requiring notification to the consulate in all instances. *Id.* at 36-38 (Thailand, United Arab Republic (*i.e.*, Egypt), Japan, France), 82-83 (Egypt, Canada, Ceylon), 337-340 (Japan, France, Republic of Korea, Republic of Viet Nam, Thailand). Eventually, the Conference adopted a compromise offered by twenty countries, including many of those who had objected to the burden of mandatory notification. See *id.* at 82. As the Egyptian delegate explained, the mandatory notification provision was changed to provide for notification upon request of the detainee not with an intent to enshrine in the treaty an individual right, but "to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which receive many tourists and visitors," and would ensure "that the authorities of the receiving State would not be blamed if, owing to pressure or work or other circumstances,

there was a failure to report the arrest of a national to the sending State." *Ibid.*[4]

Other provisions of the Vienna Convention confirm that the Convention adheres to the traditional understanding that the agreement is intended for the benefit of the State parties, not private individuals. The Convention's preamble states that "the purpose of [the] privileges and immunities [identified in the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." 21 U.S.T. at 79, 596 U.N.T.S. at 262. Although petitioners read the preamble to refer only to provisions in the Convention that define the privileges and immunities of consular officials (05-51 Pet. Br. 32-33, 04-10566 Pet. Br. 17-19), and thus not to the "rights" in Article 36, Article 36's introductory clause itself makes clear that that provision as well was designed "[w]ith a view to *facilitating the exercise of consular functions* relating to nationals of the sending State." Vienna Convention, art. 36(1) (emphasis added). As the preamble and Article 36's introductory clause show, "the purpose of Article 36 was to protect a *state's right* to care for its nationals." *De La Pava*, 268 F.3d at 165.

Equally striking, there is no indication in the Vienna Convention that the "rights" referred to in Article 36(1)(b) may be privately enforced. To the contrary, the remedies for a violation of the "rights" referred to in Article 36(1)(b) are the traditional means by which international disputes are resolved. A foreign national's government may protest the failure to

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[4] Although the United States delegate stated in connection with the amendment that it was intended "to protect the rights of the national concerned," 1 U.N. Official Records 337 (para. 39) (statement of the United States delegate), Bustillo errs (05-51 Pet. Br. 24-27) in relying on that statement. The "rights" to which the American delegate referred were not rights created by treaty, but "rights" that existed wholly independent of the draft convention, *i.e.*, "the freedom of action of the detained persons who might not wish their consulate to be informed," such as those seeking asylum, 1 U.N. Official Records 38 (para. 21).

observe the terms of Article 36 and attempt to negotiate a solution. The governments of both Mexico and Honduras have, in fact, presented their concerns about the treatment of petitioners through diplomatic channels, and the United States has apologized for its failure to fulfill its Vienna Convention undertaking.

If traditional diplomatic channels fail to provide a satisfactory resolution, the Optional Protocol establishes a mechanism that States may choose for resolving disputes through "judicial" means. Indeed, the United States has previously sought resolution of such disputes by the ICJ, as have other States who challenged the United States' compliance with its Vienna Convention obligations. By its express terms, however, the judicial mechanism provided by the Optional Protocol is voluntary. Some sixty percent of signatories to the Vienna Convention do not subscribe to the Optional Protocol, and the United States noticed its withdrawal in March 2005. Only State parties, and not their nationals, may initiate ICJ proceedings. Moreover, even when the ICJ has jurisdiction, its ruling "has no binding force except between the parties and in respect to that particular case," Statute of the ICJ, art. 59, 59 Stat. 1062, and no individual is or can be "party" to a proceeding under the Optional Protocol. The express provision of a limited and optional international judicial forum for resolving Vienna Convention disputes further supports the conclusion that the Vienna Convention did not, *sub silentio*, create individual rights that were intended to be enforceable by private individuals in domestic criminal proceedings.

The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals were deliberately placed underneath, 1 U.N. Official Records 333 (Chilean delegate), signaling what the introductory clause spells out - that the function of Article

36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state's right to protect its nationals. And on a practical level, a foreign national's rights are necessarily subordinate to, and derivative of, his country's rights. An individual may ask for consular assistance, but it is entirely up to the sending State whether to provide it.

Petitioners contend (05-51 Pet. Br. 23; 04-10566 Pet. Br. 16) that Article 36's reference to the detainee's "request[]" for notification of his consulate is proof that the Article was intended to confer an individual right, rather than to facilitate consular affairs. To the contrary, as noted above, see p. 18, *supra*, the Egyptian delegate explained that the move away from mandatory notice to the sending state was an attempt to reduce the burden on the receiving State. Although some delegates also expressed concern for the privacy interests of detainees who might not want their home governments to know of their detention, there was no indication that they understood the shift from mandatory notification to create a privately enforceable individual right. Notably, if a country prefers automatic notice whenever one of its nationals is detained, it may negotiate for such an agreement. In fact, the United States has bilateral agreements with some 58 States that are party to the Vienna Convention pursuant to which the governments will notify each other of a national's detention irrespective of the individual's wishes. See A553 (State Department guidance that "[i]f the alien is from a 'mandatory notification' country, notification must be given even if the alien objects"); A53 (listing 58 "Mandatory Notification Countries," including the United Kingdom, China, and Russia).[5] Under petitioners' view, the Vienna Convention, by bestowing upon individual foreign nationals a personal right to decide whether "to have his consulate notified or not" (05-51 Pet. Br.

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[5] All citations to "A___" are to the Annexes to the Counter-Memorial of the United States in *Avena*. The United States proposes to lodge the Counter-Memorial and Annexes with the Court, if the Court so desires.

23; 04-10566 Pet. Br. 16), would supersede any previous agreement that was inconsistent with such an individual right. See *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (noting later-in-time rule). Yet the United States continues to recognize and enforce mandatory notification agreements that were entered into before the Vienna Convention. See A581 (recognizing continuing effect of agreements with the United Kingdom and U.S.S.R. that entered into force before the Vienna Convention became effective for the United States).

C. The Vienna Convention's Ratification History And Its Construction By The Executive Branch Confirm That It Was Not Understood To Have The Radical Effect Of Creating Individual Rights

The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding in the domestic courts of the United States. See *United States* v. *Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty); *id.* at 373 (Scalia, J., concurring) (accepting resort to extratextual sources "when a treaty provision is ambiguous"). At the time of ratification, the State Department informed the Senate that "[t]he Vienna Consular Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 9, *supra*, at 18. The Senate Foreign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that "[t]he Convention does not change or affect present U.S. laws or practice." *Id.* at 2. And, following ratification, the State Department wrote a letter to all 50 governors explaining it would not require "significant departures from the existing practice within the several states of the United States." *Li*, 206 F.3d at 64. That series of statements could not have been made if the Convention were understood to give a criminal defendant a private right to challenge his conviction and sen-

tence on the ground that he was not informed as required by Article 36. See Letter from David R. Andrews, Legal Adviser, Department of State, to James K. Robinson, Assistant Attorney General, Criminal Division, U.S. Department of Justice, Re: *United States* v. *Li*, No. 97-2034 (1st Cir.) (Oct. 15, 1999) (*Li* Letter); *id.* Attach. A, Department of State Answers to the Questions Posed by the First Circuit in *United States* v. *Nai Fook Li* at A9 (State Department Answers).[6]

Of particular significance is the fact that the Executive Branch does not view the Vienna Convention as creating a right for a criminal defendant to challenge his conviction. The Executive Branch's interpretation of an international treaty "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shojo Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. The United States advised the Court of that interpretation in its brief (at 18-23) in *Breard* v. *Greene*, 523 U.S. 371 (1998) (per curiam) (No. 97-8214), and the State Department's Answers to the First Circuit's questions in *Li* confirmed that the State Department had consistently taken that position since the first time the issue was raised by foreign governments in the early 1990s. State Department Answers at A1. Most recently, that view was reiterated in the Brief for the United States in *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (per curiam) (No. 04-5928).

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[6] The State Department Answers and the *Li* Letter are reprinted in Consular and Judicial Assistance and Related Issues: Consular Notification and U.S. Criminal Prosecution: *United States* v. *Nai Fook Li* and *United States* v. *Lombera-Camorlinga*, *2000 Digest* chap. 2(A)(1), at 25-43 and is also available at <*http://www.state.gov/documents/organization/7111.doc*>.

D. The Implementation Of Article 36, Both In The United States And Abroad, Belies An Individual-Rights Interpretation

The ratification history and the State Department's interpretation accord with both the United States' own practice in enforcing the Vienna Convention and the practice of other parties to the Convention. See *Stuart*, 489 U.S. at 366 ("subsequent operation" of treaty is relevant in interpreting it). As the Vienna Convention on the Law of Treaties reflects, treaties should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340.[7] "[T]ogether with the context," treaty interpretation must take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." *Id.*, art. 31(3)(b), 1155 U.N.T.S. at 340.

The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts. State Department Answers A3. It is the Department's understanding that "this is how consular notification issues have always been handled by the United States under all of the consular conventions to which it is a party, and in situations governed by customary international law." *Id.* at A2-A3. In cases involving the death penalty (and in one other context), the Department has also requested that the violation be

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[7] Although the United States has not ratified the Vienna Convention on the Law of Treaties, the United States generally recognizes the Convention as a valuable guide to principles of treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001).

considered in clemency.[8] Likewise, in cases of American citizens detained abroad, United States consular officers "raise[] concerns about failures of consular notification through diplomatic channels or directly with the law enforcement officials concerned." *Id.* at A2. Thus, although the State Department "sets a very high standard of assistance" for American citizens detained abroad and aggressively addresses matters of Article 36 compliance, United States consular officers "do not seek judicial remedies for failures of consular notification" in the host country's criminal justice system, and the Department is "unaware of any instance in which the United States has asked a foreign court to undo a criminal proceeding based on a failure of consular notification." *Id.* at A5.

The State Department's experience abroad has been that foreign governments also usually address complaints about the failure of notification by investigating and extending apologies where appropriate. State Department Answers at A3.

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[8] The United States has also taken substantial measures to implement the Vienna Convention obligation to advise detained foreign nationals that they may contact their consuls. The State Department publishes and has placed on a public website <http://travel.state.gov/law/consular/consular_636.html>, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers that law enforcement personnel can use to obtain advice and assistance. The Department also publishes the "Instructions" as a Consular Notification and Access Manual, publishes a Consular Notification Pocket Card for police pocket use that has suggested advisories for complying with the Vienna Convention and other consular conventions, publishes a 2-foot by 3-foot wall poster that police can post in their facilities containing the consular notification advisory in many languages (Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese) <http://travel.state.gov/law/info/info_626.html>, and makes a training video available. The State Department regularly communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention.

As of 1999, the Department was not aware of any foreign country that had remedied failures of notification through the criminal justice process. *Id.* at A1, A8. While the Convention has been in force for more than four decades, surveys of foreign decisions have uncovered only a handful of decisions that even touch on the issue, even though 161 countries are now parties to the Vienna Convention. None of these cases has unambiguously endorsed a judicially enforceable individual right to attack a conviction.[9] Notably, briefs amici curiae have

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[9] Petitioners do not cite a single instance in which they contend that a foreign state has afforded recognition of an individual right under Article 36(1)(b) in the context of a criminal prosecution. Bustillo cites no example at all of foreign courts applying Article 36, and Sanchez-Llamas cites (04-10566 Pet. Br. 28) only *Khadr* v. *Canada (Minister of Foreign Affairs)* [2005] 2 F.C.R. D-25 (Can. Fed. Ct. 2004), a case in which a Canadian national detained at Guantanamo Bay sought to compel Canada to provide consular assistance based upon Canada's purported promise of such assistance in a guide published for Canadians abroad.

Neither do the foreign cases cited by petitioners' amici indicate a foreign practice of giving judicial recognition to individual rights under the Vienna Convention in the context of criminal prosecutions. See Former U.S. Diplomats Amici Br. 20-21 (citing a German case, Judgment of 7 Nov. 2001, BGHSt 5, 116 (A1956), which rejected a motion to exclude on the ground that the Vienna Convention conferred no privileges beyond those accorded to Germans, and a Canadian case, *R.* v. *Partak*, 2001 C.C.C. Lexis 312 (Ont. Super. Ct. of J. Oct. 31, 2001) (A1964), which seems only to have assumed the existence of a judicially cognizable right and declined to suppress statements); Nat'l Ass'n of Crim. Def. Lawyers (NACDL) Amici Br. 21-22 (citing *R.* v. *Van Axel*, (Snaresbrook Crown Ct. May 31, 1991) (A2006) and *R.* v. *Bassil*, (Acton Crown Ct. July 28, 1990) (A2008), in which the same British trial judge noted the lack of consular notification, but appears to have suppressed confessions based on the way in which consular notification requirements were incorporated into domestic British statutory law and the fact that the defendants, who spoke little English and were held incommunicado, might not to have understood their rights); NACDL Amici Br. at 19-20 & n.18 (citing three Australian decisions, *R.* v. *Tan* [2001] WASC 275 (W. Austl. Sup. Ct.) (unreported); *R.* v. *Su* [1997] 1 V.R. 1 (Sup. Ct. Vict.); and *Tan Seng Kiah* v. *R.* [2001] 10 NTLR 128 (N. Terr. Ct. Crim. App.), all of which discussed suppression of confessions as a matter

been filed in these cases on behalf of 36 nations that are parties to the Vienna Convention. *None* of those countries identifies a single instance in which their courts have recognized a judicially enforceable individual right under the Vienna Convention. State practice thus shows a glaring absence of private judicial remedies in criminal cases for failures of consular notification.

Finally, the government's interpretation of the Vienna Convention is consistent with how the United States has interpreted similar language found in other treaties. For example, the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), *opened for signature* Jan. 10, 2000, S. Treaty Doc. No. 49, 106th Cong., 2d Sess. (2000), 2178 U.N.T.S. 229, and the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention), *opened for signature* Jan. 12, 1998, S. Treaty Doc. No. 6, 106th Cong., 1st Sess. (1999), 2149 U.N.T.S. 284, provide:

> 3. Any person [detained in connection with terrorist financing] shall be entitled to: (a) Communicate without delay with the nearest appropriate representative of [his] State * * * ; (b) Be visited by a representative of that

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of the courts' discretion to exclude evidence based on public policy concerns on account of interrogators' violation of numerous domestic statutes, including a requirement to inform the suspect of his right to an attorney as well as to contact his consulate, *i.e.*, facts under which United States courts would also have excluded the statements pursuant to *Miranda*). Other foreign decisions from the same countries, not cited by petitioners, expressly hold that the Vienna Convention does not confer individual rights. See *Canada* v. *Van Bergen* [2000] 261 A.R. 387, 390 (2000) (A1982, A1986) ("The Vienna Convention creates an obligation between states and is not one owed to the national."); *R.* v. *Abbrederis* (1981) 1 N.S.W.L.R. 530, 543 (Ct. of Crim. App.) (Australia) (A1987, A1995) (Article 36 "is dealing with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation.").

State; (c) Be informed of *that person's rights* under subparagraphs (a) and (b).

4. The *rights* referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory in which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

Terrorist Financing Convention, art. 9, paras. 3 and 4, S. Treaty Doc. No. 49, *supra*, at 7-8, 2178 U.N.T.S. at 234 (emphasis added); see also Terrorist Bombings Convention, art. 7 paras. 3 and 4, S. Treaty Doc. No. 6, *supra*, at 7-8, 2149 U.N.T.S. at 287-288. In its transmittal package, the Executive Branch explained that this language "like the Convention as a whole as well as other similar counterterrorism conventions, is not intended to create individual rights of action." S. Treaty Doc. No. 49, *supra*, at X.

E. The International Court of Justice's Decisions Construing The Convention Do Not Overcome The Conclusions Compelled By Principles Of Treaty Interpretation, The Language And Purpose Of The Convention, And Its Implementation History

The principle that the Court should give "respectful consideration" to an international court's interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and sentence. Petitioners and their amici rely principally upon two decisions of the ICJ, in *Avena* and the *LaGrand Case* (*Germany v. United States*), 2001 I.C.J. 466 (*Lagrand*) (June 27). In *LaGrand*, the ICJ concluded that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in

this Court by the national State of the detained person." *LaGrand*, 2001 I.C.J. para. 77, at 494. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of a foreign national's Article 36 rights, a State may seek relief from the ICJ if the dispute is subject to that body's jurisdiction.

LaGrand also concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)'s requirement that the laws of the receiving State must enable "full effect to be given to the purposes for which the rights accorded under this article are intended." 2001 I.C.J. para. 91, at 497-498. That conclusion presupposes that either Article 36(1)'s reference to "rights" or Article 36(2)'s "full effect" requirement, or the two together, create an obligation for criminal courts to attach "legal significance" to a violation of Article 36(1) in a criminal proceeding even in the face of contrary domestic-law principles of default. See *ibid.*; *Avena*, 2004 I.C.J. para. 113, at 57. That understanding, however, is inconsistent with the language and structure of Article 36 of the Vienna Convention in its context as well as the understanding and implementation of the parties to the Convention.

While the ICJ's understanding of the Convention's requirements is entitled to respectful consideration, the ICJ does not exercise any judicial power of the United States, and it is ultimately the responsibility of this Court to interpret the Vienna Convention as a matter of federal law. See *Williams* v. *Taylor*, 529 U.S. 362, 378-379 (2000); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982). The United States is obligated under international law to comply with the judgment of the ICJ in any case to which it is a party and the President has taken unprecedented ac-

tion, pursuant to his constitutional and statutory authority, see p. 44 & n. 17, *infra*, to ensure compliance with the ICJ's judgment in *Avena* by determining that the convictions and sentence of the 51 Mexican nationals covered by that judgment receive review and reconsideration. The United States has no obligation to accept the reasoning underlying the ICJ's judgments, however, or to apply that reasoning in other cases. As we have demonstrated, the ICJ's reasoning is inconsistent with principles of treaty construction, including the need to construe treaty terms "in their context," "together with * * * [a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention on the Law of Treaties, art. 31(1), (3)(b), 1155 U.N.T.S. at 340. Moreover, the weight to be given an ICJ judgment is at its nadir where, as here, the Executive Branch, whose views on treaty interpretation are entitled to at least "great weight," has considered the ICJ's decisions and determined that its own longstanding interpretation of the treaty is the correct one. Notably, the withdrawal of the United States from the Optional Protocol will ensure that the United States incurs no further international legal obligations to review and reconsider convictions and sentences in light of violations of Article 36 based on the ICJ's interpretation of the Convention. Under these circumstances and in light of the considerations discussed above, this Court should conclude that Article 36 does not give criminal defendant a private right to challenge his conviction and sentence on the ground that Article 36 was breached.[10]

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[10] Although Sanchez-Llamas relies on a "presumption in favor of uniform treaty interpretation," 04-10566 Pet. Br. 28, as a basis for this Court to adopt the ICJ's reasoning in *Avena*, what is notable is the stark *absence* of other countries affording the kind of judicial remedy Sanchez-Llamas seeks. See pp. 26-27, *supra*.

II. THE SUPPRESSION OF EVIDENCE IS NOT AN AVAILABLE REMEDY FOR A VIOLATION OF ARTICLE 36'S CONSULAR NOTIFICATION PROVISION

If the Court confirms the Executive Branch's longstanding interpretation of the Vienna Convention as not creating judicially enforceable rights, its decision need go no further. However, even assuming *arguendo* that Article 36(1)(b) does confer individual rights on foreign national detainees, the violation of those rights would not warrant suppression of statements made by a detainee who was not informed about his right to contact his consular officials. Nothing in the treaty even remotely suggests that such a remedy is required, and this Court has no supervisory authority to impose an exclusionary rule remedy on the States.

A. The Court's Authority To Impose Exclusionary Rules On The States Is Highly Circumscribed

As this Court has recognized, exclusionary rules "impose[] significant costs" by "preclud[ing] consideration of reliable, probative evidence," which both "undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd. Of Probation & Parole* v. *Scott*, 524 U.S. 357, 364 (1998). Because of the high social costs of exclusionary rules, the Court has admonished that suppression should be "restricted to those areas where its remedial objectives are most efficaciously served," and that an "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *United States* v. *Payner*, 447 U.S. 727, 736 (1980) (internal quotation marks omitted).

The Court has fashioned and applied exclusionary rules to state criminal proceedings to protect federal *constitutional* rights. *Dickerson* v. *United States*, 530 U.S. 428, 444 (2000) (explaining application of *Miranda* to state courts on ground

that "*Miranda* announced a constitutional rule" based in the Fifth Amendment); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (exclusionary rule for evidence obtained in violation of the Fourth Amendment). *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958) (exclusionary rule for involuntary confessions under due process principles). These constitutionally based rules of suppression apply equally to proceedings in state court as to those in federal court. See *Dickerson*, 530 U.S. at 438.

In addition, the Court requires the exclusion of evidence when Congress itself has mandated suppression as the remedy for a statutory violation. See *United States* v. *Giordano*, 416 U.S. 505, 526-527 (1974) (requiring exclusion under 18 U.S.C. 2515). If the statute so provides, the rule would also bind the States under the Supremacy Clause. See, *e.g.*, 18 U.S.C. 2515 (no intercepted communication "may be received in evidence in any trial * * * before any court * * * of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter"). The Court has made clear however, that, as a general matter, non-constitutional violations do not warrant the suppression of evidence. See *United States* v. *Caceres*, 440 U.S. 741, 754-755 (1979) (because agent's violation of agency regulations did not contravene the defendant's constitutional rights in any respect, "our precedents enforcing the exclusionary rule to deter constitutional violations provide no support for the rule's application in this case").[11] And the Court

[11] Consistent with this Court's constitution-based approach to the exclusionary rule, the courts of appeal have repeatedly declined to order the suppression of evidence as a remedy for a violation of a federal statute or regulation that does not implicate constitutional rights, in the absence of a convincing showing that such a remedy was intended by Congress. See, *e.g.*, *United States* v. *Ware*, 161 F.3d 414, 424 (6th Cir. 1998) ("[s]tatutory violations, absent underlying constitutional violations or rights, are generally insufficient to justify imposition of the exclusionary rule"), cert. denied, 526 U.S. 1045 (1999); *United States* v. *Ani*, 138 F.3d 390, 392-393 (9th Cir. 1998) (violation of regulation governing opening of international letter mail should not be remedied through

recently emphasized that "[i]t is beyond dispute that [this Court] do[es] not hold a supervisory power over the courts of the several States." *Dickerson*, 530 U.S. at 438.

Sanchez-Llamas contends (04-10566 Pet. Br. 37) that the Court possesses the inherent power to suppress evidence "where the integrity of the criminal proceeding was jeopardized," which, he asserts, justifies the Court in fashioning a suppression remedy here. But the cases he cites do not support a broad power for the Court to create and impose on the States an exclusionary rule for Vienna Convention violations when no such rule is expressed in the treaty's text. See 04-10566 Pet. Br. 37-38 (discussing *Miller* v. *United States*, 357 U.S. 301, 313 (1958), *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957)).

In *Miller*, federal agents made a warrantless entry of a home to effect an arrest without knocking and announcing their presence. While no federal statute governed that action, the government conceded that the entry should be judged by the standards set out in the statute governing entries to execute a search warrant, 18 U.S.C. 3109. Because solely a federal prosecution was involved, and because Section 3109 does not itself provide for the exclusion of evidence, the Court's exclusion of evidence in that case is best understood as an exercise of supervisory power over the federal courts. *Miller*

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suppression); *United States* v. *Mason*, 52 F.3d 1286, 1289 n. 5 (4th Cir. 1995) (fact that Customs Service agent was not statutorily authorized to conduct search did "not rise to the level of a constitutional violation warranting suppression of the evidence"); *United States* v. *Benevento*, 836 F.2d 60, 69-70 (2d Cir. 1987) (violation of 31 U.S.C. 5317(b), requiring Customs agent to have reasonable suspicion to search luggage at port of entry for currency, did not warrant suppression), cert. denied, 486 U.S. 1043 (1988) (overruled on other grounds, *United States* v. *Indelicato*, 865 F.2d 1370 (2d Cir. 1989), cert. denied, 493 U.S. 811 (1989)); *United States* v. *Hensel*, 699 F.2d 18, 29-30 (1st Cir.) (Breyer, J.) (violation of regulation, statute, and rule of international law prohibiting search of foreign flag vessel without consent of flag state did not warrant suppression), cert. denied, 461 U.S. 958 and 464 U.S. 823 and 824 (1983).

therefore stands as no authority for the Court to create an exclusionary rule that is binding on the States.[12]

Similarly, as Sanchez-Llamas acknowledges (04-10566 Pet. Br. 39), the *McNabb-Mallory* line of cases, under which the Court excluded statements made by a suspect who was not presented to a magistrate promptly after his arrest, was adopted "[i]n the exercise of [the Court's] supervisory authority over the administration of criminal justice in the federal courts." *McNabb*, 318 U.S. at 341. That rule therefore does not—indeed, cannot—apply to state criminal proceedings. See *Dickerson*, 530 U.S. at 438; cf. *United States* v. *Alvarez-Sanchez*, 511 U.S. 350 (1994) (holding that 18 U.S.C. 3501(c), by which Congress modified, and perhaps repudiated, the *McNabb-Mallory* line of cases, is "not triggered" "[a]s long as a person is arrested and held only on state charges by state or local authorities"). Plainly, then, Sanchez-Llamas is incorrect when he relies on the "*Miller* and the *McNabb-Mallory* line of cases" to support the conclusion that "suppression is the appropriate remedy for an Article 36 violation" in state criminal proceedings. 04-10566 Pet. Br. 41.[13]

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[12] To the extent that violations of knock-and-announce principles may support the exclusion of evidence in state courts, cf. *Hudson* v. *Michigan*, cert. granted, 125 S. Ct. 2964 (2004) (No. 04-1360), it is because the "principle of announcement" "is an element of the reasonableness inquiry under the Fourth Amendment." *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995).

[13] Moreover, even in a federal criminal proceeding, the imposition, over the objection of the Executive Branch, of a remedy not expressly provided in the text of a treaty but designed to enforce the treaty would be a peculiarly inappropriate use of the judiciary's supervisory powers. The Executive Branch has the primary responsibility for ensuring compliance with the VCCR and is in the best position to assess what steps are appropriate to promote compliance and ensure reciprocal treatment of United States citizens abroad. Just as the supervisory authority of the courts must yield to a contrary congressional enactment in the domestic context, *Dickerson*, 530 U.S. at 437, the supervisory power would be inappropriate in light of a contrary executive branch determination concerning the steps necessary to ensure compliance with a treaty.

B. There Is No Basis For Construing The Vienna Convention As Incorporating An Implied Suppression Remedy

Because the Court cannot impose an exclusionary rule on the States as a matter of its supervisory authority, *Dickerson*, 530 U.S. at 438, the only basis for this Court to require suppression of petitioner's constitutionally-obtained statements in his state court criminal trial would be a finding that the Vienna Convention itself requires suppression. But it would be strange to attribute to the drafters of the Vienna Convention an intention to adopt a global exclusionary rule to apply whenever a receiving State failed to give the information required in Article 36(1)(b). Courts of other nations rarely excluded evidence (apart from involuntary confessions) from their criminal trials as a sanction for police conduct. See *Roper* v. *Simmons*, 125 S. Ct. 1183, 1226-1227 (2005) (Scalia, J., dissenting). Even in the United States, the exclusion of *voluntary* confessions because of the absence of constitutionally-based warnings was yet three years in the future at the time that the Vienna Convention was drafted in 1963. An exclusionary sanction for breach of a notification requirement would thus have been very novel indeed for an international conference of treaty negotiators. "There is no reason to think the drafters of the Vienna Convention had these uniquely American rights [to suppression of unwarned statements] in mind, especially given the fact that even the United States Supreme Court did not require Fifth and Sixth Amendment post-arrest warnings until it decided *Miranda* in 1966, three years after the treaty was drafted." *United States* v. *Lombera-Camorlinga*, 206 F.3d 882, 886 (9th Cir.) (en banc), cert. denied, 531 U.S. 991 (2000). See Craig M. Bradley, *Mapp Goes Abroad*, 52 Case W. Res. L. Rev. 375 (2001) (noting several countries that have adopted *Miranda*-type suppression rules only very recently); J. B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 Int'l Comp. L.Q. 513, 534-535 (1982) (noting that exclusion

of voluntary statements on the basis of a right against self-incrimination was not recognized in England until 1979).[14]

1. Neither the text nor structure of the Convention suggests that the drafters intended suppression of evidence as a remedy for violations of Article 36(1)

"[T]he Vienna Convention itself prescribes no judicial remedy or other recourse for its violation." *United States* v. *Ademaj*, 170 F.3d 58, 67 (1st Cir.), cert. denied, 528 U.S. 887 (1999). There is nothing in the text of Article 36(1)(b) that suggests a suppression remedy. Indeed, there is no reference at all in Article 36(1)(b) to the collection or introduction of evidence. Thus, petitioner's argument is only that Article 36(1)(b) somehow implies a suppression remedy. As noted, international law rarely specifies private remedies, particularly not at the level of detail presumed by petitioner. See 2 Restatement (Third) of Foreign Relations pt. IX, introductory note at 339 ("Many obligations under international law benefit private persons * * * but the principal remedies for violation of these obligations are interstate only; international private remedies for violations of international law are still rare.").

Notably, the ICJ's decision in *Avena* did not purport to identify a specific remedy beyond review and reconsideration that the United States was required to afford, even under the ICJ's individual-rights-creating view of Article 36. The ICJ thus stated that it was "not to be presumed * * * that partial or total annulment of conviction or sentence provides the

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[14] The courts of appeals that have addressed the issue have uniformly concluded that suppression of evidence is not an appropriate remedy for a violation of any individual rights that may be created by Article 36. See, *e.g.*, *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 986-987 (10th Cir. 2001); *Jimenez-Nava*, 243 F.3d at 198-200; *United States* v. *Page*, 232 F.3d 536, 540 (6th Cir. 2000), cert. denied, 532 U.S. 935, 1023, and 1056 (2001); *United States* v. *Chaparro-Alcantara*, 226 F.3d 616, 621-622 (7th Cir. 2000), cert. denied, 531 U.S. 1026 (2001); *United States* v. *Lombera-Camorlinga*, 206 F.3d at 885; *Li*, 206 F.3d at 61.

necessary or sole remedy" for the Article 36 violations that it found. *Avena*, 2004 I.C.J. para. 123 at 60. Indeed, the ICJ specifically cautioned that its decision did not, as Mexico unsuccessfully urged, mandate imposition of the domestic exclusionary rule in the case of Article 36 violations. *Id.* para. 127, at 61.

Sanchez-Llamas's contention that an exclusionary rule is implicit in the Vienna Convention requires a number of unwarranted inferential leaps. Most significantly, his contention (04-10566 Pet. Br. 45) that Article 36 "safeguard[s] a foreign national's privilege against self-incrimination" rests implicitly on the view that there is some nexus between a foreign detainee's invocation of his right to contact his consulate and a right to avoid self-incrimination or police interrogation. But there is no such connection. Indeed, it is highly unlikely that the Convention's drafters would have been attuned to self-incrimination concerns, since "[t]here is nothing comparable to the Fifth Amendment privilege in any supranational prohibition against compelled self-incrimination derived from any source, the privilege being 'at best an emerging principle of international law.'" *United States* v. *Balsys*, 524 U.S. 666, 695 n.16 (1998) (quoting Diane M. Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. Rev. 1201, 1259 (1998)). And *Miranda* provides no analogy here. *Miranda* protects the right against self-incrimination by prohibiting introduction of statements resulting from custodial interrogation when a suspect has not been warned of his right against self-incrimination. *Dickerson*, 530 U.S. at 435. The Vienna Convention contains no such prohibition—it provides a right to consular notification, not a right against self-incrimination or to be free from interrogation. See *Lombera-Camorlinga*, 206 F.3d at 886 ("the treaty does not link the required consular notification in any way to the commencement of police interrogation" or "to cease interrogation once the arrestee invokes his right" to have his consulate notified); *United States* v. *Ortiz*, 315

F.3d 873, 887 (8th Cir. 2002) ("the Vienna Convention does not require that interrogation cease until consular contact is made"), cert. denied, 538 U.S. 1042 (2003) and 540 U.S. 1073 (2003); *Jimenez-Nava*, 243 F.3d at 199 (same). Nor can such a requirement be read into the agreement because, unlike *Miranda*, a foreign national has no right to insist that his consulate provide him with any assistance whatsoever. That is entirely within the discretion of the sending State.

The fact that the sending State is under no obligation to provide assistance would, in most cases, make entirely speculative any determination whether the defendant had been prejudiced by his lack of awareness about Article 36. Any attempt to muster concrete evidence would create its own problems. Detainees would presumably need to obtain testimony or other evidence from the sending State's consular officers and employees to prove their claims, yet those officials are immune from the court's jurisdiction, Vienna Convention, art. 43, 21 U.S.T. at 104, 596 U.N.T.S. at 298, and "under no obligation to give evidence concerning matters connected with the exercise of their function," Vienna Convention, art. 44(3), 21 U.S.T. at 105, 596 U.N.T.S. at 298. Finally, even if the officials agreed to provide testimony, any judicial inquiry might easily embroil the courts in making rulings that could embarrass foreign governments (by concluding, for example, that testifying consular officers were not credible or that the consular post would not have provided meaningful consular assistance to its nationals). Thus, the remedy proposed by petitioner would end up undermining, rather than furthering, the central purpose of the Convention, "the promotion of friendly relations among nations." Vienna Convention, 21 U.S.T. at 79, 596 U.N.T.S. at 262; see *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968) (recognizing danger inherent in statutory scheme that "seems to make unavoidable judicial criticism" of some nations).

2. *A suppression remedy would be inconsistent with the implementation practices of the State parties to the Convention*

Any suggestion that interrogation of a foreign national must stop until the consulate has been notified and made a determination whether to provide assistance (and, if so, to make arrangements for assistance to be provided) is wholly inconsistent with the practice of the States that are parties to the treaty, including approved practices in the United States. See, *e.g.*, Vienna Convention of the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. at 340 (emphasizing importance of "subsequent practice in the application of the treaty" in interpreting a treaty's meaning). The State Department, for example, informs police that foreign nationals should be "advised of the possibility of consular notification by the time the foreign national is booked for detention," U.S. Dep't of State, Consular Notification and Access 20 (A552), which may, of course, happen after interrogation of the foreign national has given police a basis for making a charge, and the State Department indicates that notice to the consulate, if requested, would "normally * * * have been made within 24 hours, and certainly within 72 hours" of the request, *ibid.*, by which time interrogation will be completed in many, if not most, cases. Such guidelines provide far more time for notification of consular officials than would be allowed if such notification were intended to ensure consular assistance could be provided before the detainee made a knowing decision whether to cooperate in police interrogation. See *id.* at 47-49 (A579-A581) (bilateral mandatory notification agreements recognizing that notice to the consulate could take a matter of days).

The practice of other signatory nations makes the disconnect between consular notification and limitations on interrogation even more obvious. The idea that the receiving State's failure to inform a foreign national of his ability to seek consular assistance would lead to the exclusion of the national's

statements from trial would have come as a considerable surprise to many of the participants at the diplomatic conference, whose criminal justice systems were (and are) quite different from our own. For example, several parties to the Vienna Convention do not permit access to foreign detainees by their consular officials during the initial period of interrogation. According to the Declaration of Assistant Secretary of State Harty, submitted in the *Avena* matter, "France does not permit U.S. consular officials to have access to U.S. citizen detainees while they are in police custody." Harty Decl. 9 (A385). Similarly, several countries "do not permit consular access until at least initial questioning is completed" (China, Italy, Panama), or, in other cases, during an initial period of "incommunicado detention" (Argentina, Belgium, and Spain). *Id.* at 9-10 (A385-A386). Indeed, in many of these countries "suspects can be held by the police for substantial periods of time without having access even to legal counsel." Prof. Thomas Weigend Decl. in *Avena* 3 (A363) (citing Argentina, China, France, and Japan). See also *id.* at 5 (A365) (noting that suppression of reliable, voluntary statements as a form of retaliation for violating procedural rules "does not * * * comport with legal systems operating under * * * the 'inquisitorial' mode of fact-finding" in which "it is the court's responsibility to find the truth regardless of the activity or passivity of the prosecution and the defense").

3. The Senate did not intend for the Court to adopt a suppression remedy for Vienna Convention violations

In view of Congress's response to *Miranda* and other decisions of this Court authorizing the exclusion of voluntary confessions in circumstances with a clear nexus between the right and the remedy, it is virtually inconceivable that the Senate would have given its advice and consent to the Vienna Convention if it had understood that a breach of the consular-notification requirement would result in the exclusion of voluntary confessions. Two years after the *Miranda* decision—

and just one year before giving its advice and consent to the ratification of the Vienna Convention—Congress enacted 18 U.S.C. 3501, which was intended to overrule *Miranda* and restore a pure voluntariness standard for the admissibility of confessions in federal court. *Dickerson*, 530 U.S. at-435-436. Notably, the Senate Report on Section 3501 was also particularly critical of the exclusionary rule adopted in *Mallory*, which Sanchez-Llamas cites (04-10566 Pet. Br. 37-38) as an example of the Court's inherent authority to append an exclusionary rule to a federal statute, but which the Senate sought to "abrogat[e]." S. Rep. No. 1097, 90th Cong., 2d Sess. 40 (1968). See *id.* at 38 (citing "need[] to offset the harmful effects of the *Mallory* case").

In place of *Miranda* and *Mallory*, Congress prescribed a test that made voluntariness the linchpin of admissibility, after consideration of the totality of the circumstances, with the specific goal of avoiding inflexible rules. See 18 U.S.C. 3501(a).[15] It can hardly be believed that the Senate, only a year later, voted without any comment to establish a different inflexible rule that would exclude an otherwise voluntary confession in the context of an underlying "right" to consular notification, not a right to be free of involuntary self-incrimination. It is more likely that the Senate would have intended that a foreign national's "lack [of] a basic understanding of the American legal system" and "[in]ability to communicate in English" (N.Y.C. Bar Ass'n Amicus Br. 17) would be factors in answering the more fundamental question whether his statement was voluntary.

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[15] This Court held in *Dickerson* that Section 3501(a) could not displace *Miranda*'s constitutionally based rule. That holding does not undercut the relevance of Section 3501 in assessing the Senate's likely understanding that Article 36 would not threaten the admissibility of voluntary confessions in federal and state prosecutions or the validity of Section 3501 in overriding the supervisory rule adopted in *Mallory*.

III. THE VIENNA CONVENTION DOES NOT PRECLUDE APPLICATION OF PROCEDURAL DEFAULT PRINCIPLES

Even if Article 36 did create individually enforceable rights, and even if those rights were enforceable in the context of the national's criminal trial, the Convention would still not preclude Virginia from applying its procedural default rules to Bustillo's Vienna Convention claim. Virginia's long-established rule that a defendant's failure to raise a claim at trial or on direct review bars the defendant from presenting the claim on collateral review is an adequate and independent ground that will support a state habeas court's judgment. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Because, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional," this Court "has no power to review a state law determination that is sufficient to support the judgment." See *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). Bustillo's sole argument in this Court for avoiding Virginia's procedural bar rule is that the Vienna Convention precludes application of that doctrine to his Article 36 claim. That argument lacks merit.

A. This Court's Decision In *Breard* Is Controlling And Should Not Be Overturned

This Court, in fact, already considered and resolved that issue of treaty interpretation in *Breard*, in which, as here, the defendant failed to raise a Vienna Convention claim at trial or on appeal. The Court rejected as "plainly incorrect" the notion that the Vienna Convention "trumps the procedural default doctrine," and held, to the contrary, that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. *Breard*, 523 U.S. at 375. As the Court noted, "although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." *Id.*

at 376. Moreover, while acknowledging both a preliminary ICJ order related to the defendant and the principle that courts in the United States should give "respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [it]," the Court indicated in *Breard* that such "respectful consideration" was conditioned by the background international law principle that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* at 375.[16]

As the Court has noted, that background principle "is embodied in the Vienna Convention itself," *Breard*, 523 U.S. at 375, as Article 36(2) expressly provides that Article 36 rights "shall be exercised in conformity with the laws and regulations of the receiving State," *ibid.* (quoting Vienna Convention, art. 36(2)). Because "[i]t is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas," this Court concluded that Article 36(2) reinforced, rather than defeated, the principle that domestic procedural default rules apply with regard to forfeited Vienna Convention claims. *Ibid.* Accordingly, the Court in *Breard* held that, having "failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia," Breard "cannot raise a claim of violation of those rights now on habeas review." *Id.* at 375-376.

Petitioner urges the Court to revisit and overrule its *Breard* holding on the grounds that the ICJ, in *LaGrand* and

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[16] At the time of the Court's *Breard* decision, the ICJ had not yet issued its decisions in *LaGrand* or *Avena*. The ICJ had, however, issued an order "requesting that the United States 'take all measures at its disposal to ensure that * * * Breard is not executed pending the final decision in these proceedings.'" 523 U.S. at 374. In spite of the ICJ's order, the Court issued an order denying any relief to Breard, finding that his argument that the Vienna Convention trumped state procedural bar rules "plainly incorrect." *Id.* at 375.

Avena, disagreed, and the President later directed the States to take actions to implement the *Avena* decision. The President's decision to implement the ICJ's *Avena* judgment in the cases of those individuals addressed in *Avena* does not, contrary to petitioner's understanding (05-51 Pet. Br. 44), have any relevance to his case. The President's decision to implement the *Avena* judgment was not based on an interpretation of the Vienna Convention. Rather, it was based on the President's constitutionally based foreign affairs power, *American Ins. Ass'n*, 539 U.S. at 414, and other treaties and statutes.[17] And a determination to comply with an ICJ decision does not require agreement with the ICJ's treaty interpretation. Indeed, the President's determination was made contemporaneously with the United States' brief amicus curiae in *Medellin*, in which the United States specifically disputed the correctness of the interpretation of Article 36 that underlay the ICJ's *Avena* decision. The President's determination offers no basis for this Court to revisit its earlier holding as to Article 36(2)'s meaning.

Nor do the ICJ's *LaGrand* and *Avena* decisions warrant reconsideration of the Court's holding in *Breard*. The ICJ reasoned that applying the procedural default rule to bar consideration of a challenge to a defendant's conviction and sentence violates Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *LaGrand*, 2001 I.C.J. para. 91, at 497-498. But this Court already considered Article 36(2)'s "full effect" language

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[17] The President's decision to comply with the ICJ decision rested on his authority to implement the United States' obligations under United Nations Charter (which is itself a ratified treaty), including the undertaking to comply with the judgment of the ICJ in cases to which the United States is a party, United Nations Charter, art. 94, 59 Stat. 1051, and his constitutional and statutory (under the United Nations Participation Act, 22 U.S.C. 287, 287a) responsibility to direct all functions connected with the participation of the United States in the United Nations, including the ICJ.

in *Breard* and concluded, correctly, that it does not "trump[] the procedural default doctrine." 523 U.S. at 375. Application of the procedural default rule to an Article 36 claim no more prevents "full effect" from being given to the Convention's purposes than application of the same rule prevents full effect from being given to the purposes of constitutional rights, such as the right against compelled self-incrimination. See *Breard*, 523 U.S. at 376 (AEDPA procedural rule governs "Breard's ability to obtain relief based on violations of the Vienna Convention * * * just as any claim arising under the United States Constitution would be"); *Ylst* v. *Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Wainwright* v. *Sykes*, 433 U.S. at 87-88 (procedural default applies to voluntariness claims).

The ICJ's decisions in *LaGrand* and *Avena* are clearly not binding on this Court in this case. Quite apart from this Court's independent authority to declare the meaning of the treaty, Article 59 of the Statute of the ICJ says that its decisions are binding only "between the parties and in respect of that particular case." Stat. of the ICJ, 59 Stat. 1062. Moreover, the United States' undertaking under Article 94 of the United Nations Charter, 59 Stat. 1051, to comply with a decision of the ICJ in a dispute to which it is a party, is to comply with the ICJ's ultimate resolution of the dispute, not to accept all the reasoning that leads to that resolution. In this case, the ICJ's reasoning is not persuasive. In *LaGrand*, the ICJ's reasoning on this point was no more than a mere statement that, "the procedural default rule prevented [counsel] from attaching any legal significance to the fact * * * that the violation of * * * Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention," and, therefore, "the procedural default rule had the effect of preventing 'full effect [from being] given'" to Article 36(1)(b). *LaGrand*, 2001 I.C.J. para. 91, at 497-498. By that reasoning, any procedural rule that pre-

vented a court from deciding the substance of a Vienna Convention claim—such as a State's statute of limitations for seeking collateral review—would have to be set aside as inconsistent with Article 36(2). As this Court held in *Breard*, 523 U.S. at 375, there must be a far more "clear and express statement" before a treaty will be construed to require the forum State to set aside all such procedural rules—particularly when, as here, the Convention's own terms provide that its rights must be exercised "in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2).

B. Nothing About Vienna Convention Claims Takes Them Outside The Procedural Bar Rule

Bustillo alternatively contends (05-51 Pet. Br. 39-42) that Vienna Convention claims are different from most challenges to a criminal trial because the facts and issues can only be fully developed on collateral review. Petitioner relies on *Massaro* v. *United States*, 538 U.S. 500 (2003), in which the Court held, as a matter of its supervisory authority, *id.* at 504, that ineffective assistance of counsel claims "may be brought in the first instance in a timely motion in the district court under [Section] 2255 * * * whether or not the petitioner could have raised the claim on direct appeal," *ibid.* Consular notification claims, however, are markedly different from ineffective assistance of counsel claims, and the rationale that supports *Massaro* does not support a similar rule here.

If a defendant's Vienna Convention claim seeks, as Sanchez-Llamas does, suppression of evidence, the issues (assuming the availability of the remedy) would be nearly indistinguishable from a motion to suppress under *Miranda* or *Mapp*. It would be far more efficient to litigate that evidentiary issue before trial, rather than on habeas review, when any relief would require yet another round of litigation. If, as in Bustillo's case, the claim concerns delay in obtaining assistance from the consulate that could have produced evi-

dence at trial, again, it would be far better to litigate the question of a violation *at trial*, when a continuance would allow a (belatedly informed) consulate to provide any assistance it might be willing to offer.

A Vienna Convention claim is wholly unlike a claim of ineffective assistance of counsel. Trial counsel who performed deficiently cannot reasonably be expected to note his deficient performance by way of a contemporaneous objection or to make a record showing that his unprofessional actions or omissions prejudiced his client. As this Court explained, even if the defendant has new counsel on direct appeal, it would be judicially "inefficient" to require new counsel to raise for the first time ineffective assistance of counsel claims, as such a requirement would "create perverse incentives for counsel on direct appeal" to assert ineffectiveness claims "regardless of merit"; compel appellate counsel "to raise the [ineffectiveness] issue before there has been an opportunity fully to develop the factual predicate for the claim"; require initial consideration of ineffectiveness claims in an appellate forum "not best suited" to assess undeveloped facts; and create an "awkward" relationship between a defendant's trial and appellate counsel that could hamper his appeal. *Massaro*, 538 U.S. at 504-506. None of those considerations applies to consular notification claims.

An unstated premise of Bustillo's argument that consular notification claims should be treated like ineffective assistance of counsel claims for purposes of the procedural bar appears to be that the foreign national will regularly be unaware of his Vienna Convention claim at trial, but will discover it later. Even if a foreign national may not be personally aware that he is free to contact his consulate to ask for assistance, trial counsel should be in a position to advise his client of that right and to object to any violation of it, as the preserved claims in No. 04-10566 demonstrate. Relying on counsel to identify a Vienna Convention claim is no different from relying on counsel to raise potential constitutional claims

that are unknown to the defendant, including claims—such as one under *Miranda*—that the government failed to provide a detainee with required information about his rights.

A rule that allowed foreign national defendants to withhold their Vienna Convention claims until collateral review would encourage tactical gamesmanship that should be discouraged. For example, defense counsel with a plausible but untested defense might be tempted to delay seeking assistance from his client's consulate when the assistance might help but could also harm the defense, with knowledge that, in the event of a conviction, the consulate could be contacted and any helpful evidence could then be used to demonstrate prejudice from the Vienna Convention violation. Virginia's procedural bar rule reasonably, and permissibly, prevents such tactical behavior.

CONCLUSION

The judgments of the Virginia Supreme Court and the Oregon Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

A. The Supremacy Clause to the Constitution, U.S. Const. Art. 6, Cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

B. The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, provides in its Preamble and Article 36:

> The States Parties to the present Convention,
>
> Recalling that consular relations have been established between peoples since ancient times,
>
> Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
>
> Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

* * * * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to

the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

C. The Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, provides in pertinent part:

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has

been agreed upon by the parties within a reasonable period,

Have agreed as follows:

Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

* * * * *

D. Article 94 of the United Nations Charter, June 26, 1945, 59 Stat. 1033, 1051, provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

E. Article 59 of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1062, provides:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

F. The United Nations Participation Act, 22 U.S.C. 287, 287a, provides:

Section 287. Representation in Organization

(a) Appointment of representative; rank, status, and tenure; duties

The President, by and with the advice and consent of the Senate, shall appoint a representative of the United States to the United Nations who shall have the rank and status of Ambassador Extraordinary and Plenipotentiary and shall hold office at the pleasure of the President. Such representative shall represent the United States in the Security Council of the United Nations and may serve ex officio as representative of the United States in any organ, commission or other body of the United Nations other than specialized agencies of the United Nations, and shall perform such other functions in connection with the participation of the United States in the United Nations as the President may, from time to time, direct.

(b) Appointment of additional representatives' rank, status, and tenure; duties; reappoint, went unnecessary

The President, by and with the advice and consent of the Senate, shall appoint additional persons with appropriate titles, rank, and status to represent the United States in the principal organs of the United Nations and in such organs, commissions, or other bodies

as may be created by the United Nations with respect to nuclear energy or disarmament (control and limitation of armament). Such persons shall serve at the pleasure of the President and subject to the direction of the Representative of the United States to the United Nations. They shall, at the direction of the Representative of the United States to the United Nations, represent the United States in any organ, commission, or other body of the United Nations, including the Security Council, the Economic and Social Council, and the Trusteeship Council, and perform such other functions as the Representative of the United States is authorized to perform in connection with the participation of the United States in the United Nations. Any Deputy Representative or any other officer holding office at the time the provisions of this Act, as amended, become effective shall not be required to be reappointed by reason of the enactment of this Act, as amended.

Section 287a. Action by representatives in accordance with Presidential instructions; voting

The representatives provided for in section 287 of this title, when representing the United States in the respective organs and agencies of the United Nations, shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President, and such representatives shall, in accordance with such instructions, cast any and all votes under the Charter of the United Nations.

Supreme Court, U.S.
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Nos. 04-10566 & 05-51

In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,
v.
STATE OF OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Courts of Oregon and Virginia

BRIEF OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

(1) Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States?

(2) Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individual rights?

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. Under the Supremacy Clause, the States are bound to observe the terms of Article 36 of the Vienna Convention on Consular Relations, done Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94. All 50 States have foreign nationals (and alleged foreign nationals) incarcerated in their state prison systems. According to a recent government report, more than 57,000 foreign nationals were incarcerated in State prisons as of mid-2004. Paige M. Harrison & Allen. J. Beck, *Prison and Jail Inmates at Midyear 2004* (Table 6), http://www.ojp.usdoj.gov/bjs/abstract/pjim04.htm (last revised April 24, 2005).

This case will determine whether the Vienna Convention creates individual rights enforceable in American Courts and, if so, whether those rights displace well-established criminal-procedure doctrines applied across the country. Because the resolution of the issues presented in this case may profoundly affect every State criminal-justice system, the States have a substantial interest in opposing Petitioners' attempt to create judicially-enforceable rights and implied procedural requirements in the Vienna Convention.

SUMMARY OF THE ARGUMENT

The Vienna Convention does not create individual rights: The Vienna Convention, by its own terms, defines the reciprocal rights and obligations of nations in the exchange of consuls. It expressly disavows the creation of individual rights. Although some incidental language in Article 36 of the Convention might be read, in isolation, as discussing individual rights, it is insufficient to overcome the presumption that a treaty does not create individual rights absent a clear and unambiguous statement to that effect. This presumption prevents the courts from inadvertently expanding treaties beyond the President's and the Senate's intent in entering into and ratifying them. In this case, the Senate ratified the Convention under the belief that it would not change the existing

laws of the United States. This confirms that the Convention should not be read to change United States domestic law.

The Vienna Convention Does Not Impose Judicial Requirements on the United States: The Petitioners and their *amici* argue that the Vienna Convention enacted two procedural requirements as federal law: abrogation of the procedural-default doctrine and adoption of an exclusionary rule regarding consular-notification failures. The text of the Convention does not establish those requirements.

Like the state courts, the judiciaries of other nations have universally refused to apply Article 36 of the Vienna Convention in the way the Petitioners seek. The Court should not interpret the holdings of the International Court of Justice or the amicus briefs filed in this case by foreign sovereigns as an indication that the treaty is so applied abroad. "Litigation" before the ICJ is part of a political and diplomatic—not a legal—dispute-resolution mechanism that ultimately results in political negotiation at the level of the U.N. Security Council. The foreign nations that accord additional procedural rights based on consular notification do so based on their own domestic statutes or common-law authority, not based on the Vienna Convention as such.

The Court Should Maintain its Reluctance to Interfere in the States' Criminal-Procedure Systems Absent a Violation of the U.S. Constitution: Petitioners ask the Court to change U.S. law despite the Senate's understanding that the Vienna Convention would not change United States domestic law. Petitioners and *amici* argue that changing the States' criminal-procedure laws will serve as a more effective way to implement the Convention and will benefit the United States diplomatically. These policy justifications, even if true, are political, rather than legal. Such policy balancing is best left to the political branches and to the States, which retain authority to administer their own criminal-justice systems.

State-law procedural default is an adequate and independent state-law ground for refusing to reconsider criminal convictions, and the Court has consistently declined to interfere with the doctrine, even allowing it as a bar to claims brought under the federal Constitution. Petitioners ask the Court to interfere with state criminal procedure without providing basis in the federal Constitution for doing so. The Court should not acountenance such interference, especially given the Court's longstanding recognition of the importance of the procedural-default doctrine to the efficient and fair functioning of the criminal-justice system.

ARGUMENT

Petitioners frame this case as a dispute between the States of Oregon and Virginia and the federal government regarding the implementation of Article 36 of the Vienna Convention. There is no such dispute—the States fully recognize their obligation to comply with the United States' treaty obligations.

Indeed, on this issue, the States and the United States are of one accord.

The impediment to implementing the Vienna Convention as Petitioners request is not resistance from the States. Instead, the Court's treaty-interpretation precedent, limited as it is by the strictures of the constitutional framework of government, forecloses that result. And rightly so, given that other nations do not consider the Vienna Convention, by itself, to form a basis for invalidating criminal convictions.

I. THE VIENNA CONVENTION DOES NOT CONFER INDIVIDUAL RIGHTS.

The Vienna Convention on Consular Relations is a 79-article, multilateral treaty negotiated in 1963 and ratified by the United States in 1969. The treaty governs "the establishment of consular relations, [and] defin[es] a consulate's functions in a receiving

state." *United States v. Alvarado-Torres,* 45 F.Supp.2d 986, 988 (S.D. Cal. 1999). Article 36(1)(b) of the Convention states that the authorities of a "receiving state" shall, without delay, inform any detained foreign national of his right to have the consular post of the "sending state" notified of his detention. Article 36(1)(a) provides that consular officers shall be free to communicate with nationals of the sending state, and Article 36(1)(c) gives consular officers the right to visit and correspond with the detained foreign national and to arrange for his legal representation. *Id.*

Both Petitioners argue that Article 36 creates individual rights and that it constitutes binding federal law by virtue of the fact that the Vienna Convention is a self-executing treaty. Sanchez-Llamas Merits Br. at 11-14; Bustillo Merits Br. at 16-20. This reasoning is inconsistent with the text of the Convention itself—the preamble to the Vienna Convention expressly disavows the creation of individual rights, and the Convention's ratification history demonstrates that the Senate did not believe that the Convention would change existing United States law.

A. The Text of the Vienna Convention Does Not Create Individual Rights.

Treaty provisions are construed according to the traditional rules of statutory construction, and the Court looks first to the plain language. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."). As the Court did when construing Article 36 in *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam), it should begin with the Convention's text. The text of the Convention is clear. Neither Article 36 nor the other provisions of Chapter II of the Convention were intended to create individual rights.

1. The text of the Convention does not require that violations of consular notification be remedied in criminal proceedings.

The Vienna Convention is based on the premise that "an international convention on consular relations, privileges and immunities would ... contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." VIENNA CONVENTION, preamble. The Convention expressly provides,

> "the purpose of [the] privileges and immunities [discussed in the Convention] is *not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).[1]

Chapter II of the Convention, in which Article 36 appears, is entitled "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other Members of a Consular Post." Its focus is the prerogatives of the "sending State," not individual foreign nationals. Article 36, in turn, is in Section I of Chapter II—a Section itself titled "Facilities, Privileges and Immunities Relating to a Consular Post." Notably, Article 36 is not found in Section II, which deals with facilities, privileges, and

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3. The preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (looking to the Warsaw Convention's preamble to determine the purpose of the contracting parties); *El Al Israeli Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 156-57 (1999) (same); *Alvarez-Machain*, 504 U.S., at 672-73 (relying on preamble to extradition treaty with Mexico to determine intent of contracting states).

immunities of individuals, *i.e.*, consular officers and other "members of the consular post."[2]

In keeping with the overall purpose of the Convention, Article 36 begins with the express statement that the provisions of paragraph (1), including the requirements of consular notification at issue in this case, are established "with a view to facilitating the exercise of consular functions relating to nationals of the sending State." Paragraph 2 of Article 36 provides that "rights referred to in paragraph 1" of the Article "shall be exercised in conformity with the laws and regulations of the receiving State," so long as those laws "enable full effect to be given" to the purpose of the rights accorded by Article 36—those purposes being specified as "facilitating the exercise of consular functions" as described in paragraph 1. When Article 36 is violated, the aggrieved party is the sending State, because it is the sending State whose consular operations have been hindered by the violation.

Although Article 36 may provide some collateral benefits to individual foreign nationals, its overriding purpose is to facilitate the performance of consular functions by consular officials. Given that the Convention's preamble expressly states that the purpose of the treaty is not to create individual rights, the Court should reject

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2. Bustillo erroneously argues that the preamble cannot control interpretation of Article 36 because, as a result, the preamble would prevent Section II from conferring rights on consular personnel. Bustillo Merits Br. at. 33 & n.9. Bustillo ignores the fact that Section II does not create rights for foreign citizens generally, but only to consular personnel, as an element of their official duties on behalf of the sending State. *E.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 693-94 (1976) (recognizing that the scope of consular privileges and rights is determined by the capacity in which an individual represents a foreign government, and is not held by the individual as such).

Petitioners' invitation to discover such rights in Article 36 — which would directly contravene the negotiated meaning of the treaty.[3]

2. Article 36 does not overcome the presumption that treaties do not create individual rights.

The term "self executing" usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111(4) (1987). It is beyond cavil that the Vienna Convention is self-executing in the sense that no implementing legislation was required.

However, whether the terms of a treaty provide for private rights that are enforceable in domestic courts is a wholly separate question. *See id.*, at §111, cmt. h; *see also United States v. Li*, 206 F.3d 56, 68 (CA1 2000) (Selya & Boudin, JJ., concurring) ("That courts sometimes discuss [self-execution in the sense of need for implementing legislation and self-execution as creating individual rights] together ... does not detract from their distinctiveness. At

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3. Notably, the ICJ's judgment in which it declared that Article 36 creates an individual right analyzes the Article in isolation, without mentioning the preamble. *See LaGrand* (F.R. G. v. U S.), 2001 I.C.J. 466 (June 27), ¶67. Vice President Shi's concurrence sheds some light on the ICJ's strategic drafting of paragraph 67, which Vice President Shi criticized for ignoring the preamble's plain text. *See LaGrand*, Separate Opinion of Vice-President Shi, ¶5. Yet, although he believed that "the view that Article 36, paragraph 1, specifically subparagraph (b), creates individual rights is at the very least a questionable one," *id.* ¶16, Vice President Shi nonetheless voted for the portion of the judgment requiring "review and reconsideration of the conviction and sentence," *see LaGrand*, ¶127(7), on the explicit ground that because the case involved the death penalty "every possible measure should be taken to prevent injustice or an error in conviction or sentencing," Separate Opinion of Vice-President Shi, ¶17.

bottom, the questions remain separate."). Petitioners' contention that the Vienna Convention is "self-executing" in the sense that it creates individual rights enforceable in American judicial proceedings, either directly or by virtue of the ICJ's opinions on the issue, is simply incorrect. In light of the principles governing the interpretation of treaties, neither the text nor the history of the Vienna Convention supports Petitioners' claims.

The general rule is that "[i]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." RESTATEMENT (THIRD) §907, cmt. a. This rule derives from the longstanding principle that "[a] treaty is primarily a compact between independent nations," and that it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Because treaty violations have traditionally been resolved by "international negotiations and reclamations," the Court has concluded that "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* This principle has consistently been applied by U.S. courts. *See, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (holding that the Geneva Convention on the High Seas and the Pan-American Maritime Neutrality Convention, "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action.").[4]

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4. *See also Goldstar v. United States*, 967 F.2d 965, 968 (CA4 1992) ("International treaties are not presumed to create rights that are privately enforceable."); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (CA5 2001) ("[Treaties] do not generally create rights that are enforceable in the courts."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808

Moreover, settled principles of treaty construction obligate the Court to avoid the constitutional conflict that would be occasioned by Petitioners' proposed interpretation. Statutes are "to be so construed so as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). The same canon of constitutional avoidance has always applied to treaties as well. *See Murray v. the Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, if it is "fairly possible" to construe a statute or treaty without contravening the Constitution, the Court should do so. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). The presumption against individual rights is a means of avoiding constitutional conflict—although both treaties and laws are "the law of the land" under the Supremacy Clause, U.S. CONST. art. VI, cl.2, treaties and laws are not automatically the same thing. Treaties fall within the Executive branch's foreign-affairs power, subject to Senate approval, *id.*, art. II, §2, while laws fall within Congress's legislative authority, subject to the Executive's veto, *id.*, art. I, §7. The grants of power are not coextensive. A low standard for determining that a treaty creates individual rights would necessarily lead to potential constitutional

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(CADC 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in the courts."); *Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring) ("The background presumption that treaties do not create privately enforceable rights . . . [is an] extremely important principle. . . . It is surprisingly difficult to accept the idea that, in most instances, either the Executive Branch or the ratifying Senate imagined that it was empowering federal courts to involve themselves in enforcement on behalf of private parties who might be advantaged or disadvantaged by particular readings of particular treaty provisions."); *accord Garza v. Lappin*, 253 F.3d 918, 924 (CA7 2001) (judgment of Inter-American Court did not bar imposition of death penalty because the treaty relied upon could not be construed to create individual rights); *United States v. Davis*, 767 F.2d 1025, 1030 (CA2 1985).

infirmities, because it would muddy the source of the federal government's authority.

A presumption against the creation of individual rights in treaties avoids potential constitutional infirmities by eliminating most instances in which a treaty could be construed to conflict with existing laws. The Court's cases draw a bright-line distinction. If a treaty either establishes a legal standard for particular type of claim or expressly states that it confers rights on foreign nationals, the Court applies the treaty in domestic courts. Otherwise, it does not. This test preserves the distinction between legislation and treaties; the Senate has the opportunity to evaluate the treaty in terms of any potential resulting change in the law.

For this reason, even treaties that directly benefit private parties are not necessarily construed to create private rights or provide for a private cause of action in domestic courts. For example, in *United States v. Gengler*, 510 F.2d 62, 67 (CA2 1975), the court held that "even where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that any rights arising out of such provisions are, under international law, those of the state and ... individual rights are only derivative through states." Likewise, in *United States v. Rosenthal*, 793 F.2d 1214, 1232 (CA11 1986), the court found no merit in the defendants' argument that the actions of the United States violated its extradition treaty with Colombia because "[u]nder international law it is the contracting foreign government that has the right to complain about a violation."

A treaty *can* create individual rights, but only when the text of the treaty does so unambiguously. As recognized in *The Head Money Cases*, a treaty establishing particular "rights of property by

descent or inheritance," gives those obligations the force of law. 112 U.S., at 598.[5]

Both Petitioners provide lists of cases that, they argue, demonstrate that the Court always, without exception, applies treaties to protect private litigants. Sanchez-Llamas Merits Br. at 28-29; Bustillo Merits Br. at 18 & n.3. The referenced cases do not support Petitioners' arguments. Instead, they illustrate the specific and narrow circumstances in which the Court has held that treaties provide judicially-enforceable individual rights. Each treaty either (1) contains an express statement to that effect or (2) expressly adopts a specific legal standard governing cases involving foreign nationals.

Thus, for example, in *Kolovrat v. Oregon*, the treaty stated that "Serbian subjects in the United States[] *shall enjoy the rights*" granted to most-favored nations. 366 U.S. 187, 192 n.6 (1961) (emphasis added). The sole case cited by the Petitioners involving a multilateral convention specifically governed the reciprocal rights of citizens regarding trademarks. *Bacardi Corp. v. Domenech*, 311 U.S. 150, 169 (1940) (discussing section titled "Equality of Citizens and Aliens as to Trade Mark and Commercial Protection"). These

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5. The sole case cited by Petitioners involving the privileges of a foreign consulate in fact rejected Petitioners' position. In *Wildenuhus's Case*, 120 U.S. 1 (1887), the *Belgian Consul* sought to bring a habeas corpus claim regarding a suspect in a murder committed aboard a Belgian vessel anchored in a United States port. In holding that the consul held a right under the bilateral consular-relations treaty between the United States and Belgium, the Court recognized that the treaty "settle[d] and define[d] the rights and duties of the contracting parties", *id.* at 12, and not those of the individual criminal suspect.

treaties create individual rights because they contain *express language* to that effect.[6]

Other treaties expressly establish legal standards. Thus, the two extradition cases Petitioners cite, *United States v. Rauscher*, 119 U.S. 407 (1886), and *Johnson v. Browne* , 205 U.S. 309, 320-22 (1907), recognized that the rule of "specialty" governs extradition treaties as a matter of international custom and therefore informs the courts' application of extradition law. That custom has now been adopted by statute. *See United States v. Alvarez-Machain,* 504 U.S. 655, 667 (1992). Likewise, treaties governing seizure of foreign ships expressly create legal standards that apply in admiralty.[7] *Cook v. United States*, 288 U.S. 102, 111-12 (1933);

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6. The most important early cases involve the United States' treaty obligations to protect the property rights of British citizens following independence. The United States had undertaken to guarantee those rights as a condition of peace with Great Britain; accordingly state laws predating adoption of the Constitution could not trump the bargain regarding property rights. *See Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1812) ("British subjects ... shall continue to hold [their lands]"); *Higgonson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808) ("all persons who have any interest in confiscated lands ... shall meet with no lawful impediment in the prosecution of their just rights"); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 103, 110 (1801) (same); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 258-59 (1796).

7. The remaining treaty provisions on which the Court has recognized a treaty right were bilateral treaties of amity and commerce specifically designed to create individual rights for the citizens of foreign countries, including Germany, *Clark v. Allen*, 331 U.S. 503, 514-15 (1947); Denmark, *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); Japan, *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928), *Asakura v. City of Seattle*, 265 U.S. 332, 340 (1924); China, *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345; *Chew Heong v. United States*, 112 U.S. 536, 542 (1884); France, *de Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *Chirac v.*

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

Article 36 neither contains language expressly creating an individual right of consular notification, nor does it establish a legal standard for evaluating such lawsuits. It does not, therefore, create a judicially-enforceable individual right under the Court's precedent.

B. The State Department Has Consistently Construed the Convention Not to Create Individual Rights.

The State Department has consistently maintained that the Vienna Convention does not create individual rights. The United States' historic interpretation of the Vienna Convention should be accorded substantial deference. *See, e.g., El Al Israeli Airlines v. Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

In *United States v. Li*, the First Circuit specifically posed the question whether the Vienna Convention creates individual rights, and the State Department advised the court that the Convention is a treaty that establishes state-to-state rights and obligations, not individual rights. *See* 206 F.3d, at 63 (citing "Department of State Answers to the Questions Posed By the First Circuit in United

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Chirac's Lessee, 15 U.S. (2 Wheat.) 259, 270 (1817); Switzerland, *Hauenstein v. Lynham*, 100 U.S. 483, 584-86 (1879); and the United Kingdom, *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496 (1824); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464 (1823) (same); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (same).

States v. Nai Fook Li," hereinafter "State Department Li Answers," at A-1, A-3). The State Department specifically addressed the remedies for violations of the consular notification procedures: "The [only] remedies for failures of consular notification under the [Vienna Convention] are diplomatic, political, or exist between states under international law." *Id.* The United States reiterated this history in its *amicus curiae* brief supporting the State of Texas in *Medellin v. Dretke*, No. 04-5928, Brief for the United States as *Amicus Curiae* Supporting Respondent, at 22-23.

As *Li* noted, the State Department's position on the Convention may be traced to the treaty's inception. The court first pointed to a 1970 letter sent by a State Department legal adviser to the governors of the fifty States shortly after the Convention's ratification, advising that the Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the United States." *Id.*, at 64. In 1989, a letter from a Department legal adviser informed a foreign national being held in an American prison that "[w]hile the U.S. authorities are required to comply with the obligations [of Article 36], failure to do so would have no effect on [his] conviction or incarceration." *Id.*

Li also pointed to the State Department's written submission to the Inter-American Court of Human Rights in 1998, when Mexico sought an advisory opinion on the availability of criminal remedies for failures of consular notification—the precise issue raised in this case. The Department's submission unequivocally stated that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." *Id.* (emphasis added). The *Li* court thus correctly concluded that "the Department has denied the availability of criminal remedies for failures of consular notification." *Id.*

C. The History of the Convention Does Not Demonstrate an Intent to Create Individual Rights in Article 36.

The plain text of the treaty disclaims individual rights. Even if there were any ambiguity, it should be resolved against finding such rights. When a treaty's terms are considered ambiguous, the Court typically relies upon nontextual sources "such as a treaty's ratification history and its subsequent operation." *United States v. Stuart*, 489 U.S. 353, 366 (1989). Petitioners turn to the ratification history and *travaux préparatoires* of the Convention to suggest that Article 36 was intended to create individual rights. *See* Sanchez-Llamas Merits Br. at 23-26; Bustillo Merits Br. at 24-29. But the passing references to the negotiation and ratification of the Vienna Convention contained in Petitioners' account do not tell the whole story—the United States ratified the treaty under the express condition that it would effect no change in domestic law.

Senate Committee on Foreign Relations Chairman William J. Fulbright's report to the Senate highlighted the treaty's preamble and then listed five factors that helped secure the Committee's approval. The very first such factor was the Committee's belief that the "Vienna Convention *does not change or affect present U.S. laws or practice*." S. Exec. Doc. E app., 91-1, at 46 (1969) (emphasis added). That statement of Senate intent would be incomprehensible if the treaty were in fact understood to create individual rights that could abrogate U.S. statutes and the procedural-default rule in all 50 States, across the criminal-justice system.

Moreover, despite casual statements suggesting the contrary, the State Department's only formal answer to the question whether the Convention created individual rights was altogether negative. A State Department legal adviser submitted written testimony on the Convention to the Senate Committee on Foreign Relations on October 7, 1969. The statement indicated that the "Vienna ... Convention does *not* have the effect of overcoming Federal or State

laws beyond the scope long authorized in existing consular conventions." *Id.* (emphasis added). The Department's testimony also emphasized the Vienna Convention's preamble, which states explicitly that the treaty's purpose is "not to benefit individuals." S. Exec. Doc. E app., 91-1, at 46 (1969).

Nor do the *travaux préparatoires* include more than a passing reference to consular notification being a right held by a citizen. Certainly, the *travaux* include no express indication of an intent to expressly create rights. The passing references to the notification right as belonging to the individual are, therefore, the most convenient mechanism for referring to the reciprocal obligation between nations. *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring).[8] Moreover, the Statements from the *travaux* on which the Petitioners rely must be read in context. Article 36 was framed in terms of an individual's choice to contact his national consulate in order to ensure that defectors and captured military officers would not be required to contact their own governments against their wills. *See* 1 U.N. Conference on Consular Relations: Official Records, at 38 ¶ 21; 83-84 ¶¶ 73 & 74, U.N. Doc.A1 Conf.25/16 U.N. Sales No. 63.X.2 (1963). The language was thus drafted as it

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8. *See Li*, 206 F.3d, at 66 (Selya & Boudin, JJ., concurring):

> "It is common ground that the [Convention is an] agreement[ ] among sovereign States. Nothing in [its] text explicitly provides for judicial enforcement of [ ] consular access provisions at the behest of private litigants. Of course, there are references in the treaties to a 'right' of access, but these references are easily explainable. The contracting States are granting each other rights, and telling future detainees that they have a 'right' to communicate with their consul is a means of implementing the treaty obligations *as between States*. Any other way of phrasing the promise . . . would be both artificial and awkward." (emphasis in original).

is in order to limit the scope of the consular nations' rights over its citizens. Nothing in the *travaux* indicates an intent on the part of the parties to the treaty to adopt consular notification as an element of their domestic criminal law.

D. Fulfilling Treaty Obligations Under Article 36 is the Task of the Political Branches.

As the Court has long recognized:

> "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and long have been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Airlines v. Waterman SS Corp.*, 333 U.S. 103, 111-12 (1948).

A nation considering itself harmed by congressional enactment following a treaty may "present its complaint to the executive head of the government.... The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

Nor is the judiciary well suited to determine how the United States should act under a treaty, because the United States has discretion to disregard treaty obligations: the President has the power to waive treaties, *Charlton v. Kelly*, 229 U.S. 447, 475-76 (1913), and Congress may enact inconsistent legislation, *Whitney*, 124 U.S., at 194. The Executive Branch is best-suited to foresee the

implications of its actions regarding treaties because the State Department maintains diplomatic contacts throughout the world. The choice of the best manner in which to fulfill a treaty—or, in the alternative, whether to negotiate for a lesser obligation or even to withdraw from an obligation entirely—is by necessity "delicate" and "complex." As a prudential matter, the courts should not interfere in the process.

II. THE COURT SHOULD NOT ADOPT THE ICJ'S INTERPRETATION OF ARTICLE 36, WHICH IS CONTRARY TO THE ACTUAL PRACTICE OF PARTIES TO THE VIENNA CONVENTION.

Petitioners do not rely on the decisions of the International Court of Justice in *Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12 (Mar. 31) and *La Grand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), as direct authority, although Sanchez-Llamas argues that those decisions deserve deference in the interest of "uniform treaty interpretation." Sanchez-Llamas Merits Br. at 26-28; Bustillo Merits Br. at 30-31. Many of Petitioners' *amici* argue that the Court should defer to the ICJ's interpretation of Article 36. *E.g.*, E.U. *Amicus* Br., at 3-7.[9]

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9. Bustillo's statement that 63 nations have filed briefs in support of his position is somewhat misleading to the extent it includes all of the members of the European Union. Bustillo Merits Br. at 29. The E.U. is not a party to the Vienna Convention and only three of its member nations, Liechtenstein, Norway, and Switzerland, were willing to join the E.U.'s *amicus* brief in their capacity as signatories to the Convention. E.U. *Amicus* Br. at 2. The only reported judicial opinion from an E.U. member country that is also a party to the Convention, Germany, has in fact refused to provide "review and reconsideration" of a criminal conviction based on Article 36. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, available at http://www.bundesgerichtshof.de (Germany).

These arguments are all based on an untenable premise—that the ICJ's interpretation of Article 36 represents the uniform application of the treaty. It does not, and neither Petitioners nor their *amici* mention a single instance in which another country's courts have revisited a criminal conviction based on a defendant's consular-notification rights absent a domestic statute requiring that result. Nor do other nations apply the ICJ's decisions in their domestic courts as a general matter.

A. The ICJ's Interpretation of Article 36 is Contrary to Actual International Practice.

In *LaGrand*, the ICJ determined that Article 36 creates individual rights. 2001 I.C.J, at 493, ¶¶73 & 74. And in *Avena*, the ICJ determined that Article 36 mandates "review and reconsideration" of criminal convictions. 2004 I.C.J., at 35-36, ¶40. At the time *LaGrand* was decided in 2001, according to the State Department, no country in the world had interpreted the Vienna Convention to create individual rights or ordered reconsideration of a criminal conviction based on violation of Article 36.[10] Thus, *LaGrand* itself rejected the prevailing, uniform interpretation of the Convention.

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10. After a comprehensive investigation into international practice, the State Department "found no indication that other states party have remedied such failures by granting remedies in the context of their criminal justice proceedings." State Department *Li* Answers at A-8, A-9 (commenting that no party had produced a single example of a nation providing a judicial remedy for Article 36 violations); *see also Avena*, Counter-Memorial of the United States, at 288-90 (Mexico failed to provide a single example of a state practice of reconsidering convictions based on consular-notification); *Canada v. VanBergen*, 261 A.R. 387, 390 (2000) (rejecting legal challenge to extradition from Canada based on Article 36); *R. v. Abbrederis*, [1981] 36 A.L.R. 109 (Australia), 122-23; *Re Yater*, "Judicial Decisions," 1976 Ital. Y.B. Int'l Law, at 336-39, Vol. II (decided by Italy's Court of Cassation Feb. 19, 1973).

Although some courts have stated in passing that Article 36 creates an "individual right," international practice has not changed since the *Avena* decision. At least two courts have refused to apply the ICJ's judgment as a basis for revisiting a conviction—including a court in Germany, the party that brought *LaGrand* in the first place. *See* BGH 5 StR 116/0 decided on 7 Nov. 2001, available at http://www.bundesgerichtshof.de (Germany); *see also R. v. Partak*, [2-1] 160 C.C.C. (3d) 553, 570 (Canada). There is thus a divergence between the diplomatic positions of foreign countries and the effect given to the Vienna Convention in actual judicial decisions.

Sanchez-Llamas suggests that the Canadian courts have recognized an individual right that applies in criminal proceedings by citing *Khadr v. Canada*, 123 C.R.R. (2d) 7, 23 (Fed. Ct. 2004) (Canada). Sanchez-Llamas Merits Br. at 27-28. *Khadr* was a suit by the parents of a Canadian national attempting to force the Canadian government to provide consular services to a Canadian citizen, who had been detained outside of Canada, under *a statute* prescribing the obligations of Canadian consuls. *Id.* at 19. The *Khadr* court used the Vienna Convention to inform its analysis of a Canadian statute, not as a basis for its decision. *Id.* at 26.[11]

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11. The countries that have applied the Vienna Convention to criminal convictions have done so based on internal statutes mandating that result. *See* NACDL/LCA Br. at 16-20 (discussing Part 1(C), Section 23P, of the Crimes Act 1914). As the NACDL's brief recognizes, the countries that apply an exclusionary rule based on the Vienna Convention all do so by statute, not based on the treaty itself. *Id.* at 17 n.11. None has applied *Avena*'s holding to revisit a criminal conviction. Nor have the United Kingdom's courts—which govern criminal procedure under their separate common-law authority rather than by application of a written constitution—applied an exclusionary rule based on Article 36. *See id.*, at 20. Rather, two U.K. trial courts have excluded evidence under their general common-law power to do so. *R. v. Bassil and Mouffareg* (1990)

In short, the Court should not interpret the *amicus* briefs filed by various foreign countries as a statement of those countries actual practice. Neither Petitioners nor Petitioners' *amici* cite even a single instance in which a foreign court has directly applied the Vienna Convention to collaterally attack or void a criminal conviction. *E.g.*, Mexico *Amicus* Br., at 7-30 (discussing in theory the application of Article 36 in U.S. courts, but not discussing Mexico's actual domestic practice). Indeed, Mexico's position in this case marks a reversal of its longstanding position that Article 36 violations should not be the basis for reversing criminal convictions.[12]

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28 July, Acton Crown Court HHJ Sich (reported in Legal Action 23, December 1990); *R. Van Axel and Wezer* (1991) 31 May Snaresbrook Crown Court, HHJ Sich (reported in Legal Action 12, September 1991). To the extent that courts in the United States retain such common-law power given the tendency to adopt statutory regimes governing criminal procedure, plenary authority to adopt such exceptions rests with the States and not with the Court, save for rights conferred by the federal constitution. *See infra*, part III.A.

12. Mexico's litigation posture in *Avena* was a reversal of its traditional position on the subject. The 1976 Treaty on the Execution of Penal Sentences, Nov. 25, 1976, Mex.- U.S., 28 U.S.T. 739, at Mexico's explicit insistence, provides for enforcement of Mexican convictions with no mention of Mexico's Article 36 violations. Mexico, in recognizing its own poor record in complying with Article 36, stated that "we cannot.... expect that irregularities will not occasionally be committed." Letter from Alfonso Garcia Robles, Foreign Minister of Mexico, to Henry A. Kissinger, Secretary of State of the United States of America (Mar. 25, 1976). Mexico's federal law governing consular-notification provides no judicial remedy for individuals, only a consular-notification requirement. LEYES Y CODIGOS DE MEXICO, C.F.P.P., art. 128.IV (1995) ("Si se tratare de un extranjero, la detencion se comunicara de inmediato a la representacion diplomatica o consular que corresponda." ("In the case of an alien, the fact that he has been placed in custody shall be reported

B. The ICJ's decisions do not provide a "rule of decision."

Amici ICJ Experts go one step further than the litigants and argue that *Avena* and *LaGrand* create a "rule of decision" that this Court has no power to disregard. ICJ Experts *Amicus* Br. at 20. They argue that the Optional Protocol to the Vienna Convention transforms the ICJ's judgments into part of the treaty, and that as a result the ICJ's decision is incorporated into United States law by the Supremacy Clause. However, the decisions of international tribunals are not themselves "treaties", nor do they fall within the other two categories of federal law—the "Constitution" and "Laws of the United States." U.S. CONST. art. VI, cl.2. The ICJ's decisions, by themselves, cannot create an individually enforceable right that requires reconsideration of a criminal conviction.

1. The only potential legal basis for deferring to the ICJ's decisions was the Optional Protocol, from which the United States has withdrawn.

The only potential basis for the Experts' position is the Optional Protocol to the Vienna Convention, a provision that refers disputes over the treaty to the ICJ. See OPTIONAL PROTOCOL TO THE VIENNA CONVENTION ON CONSULAR RELATIONS CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES, Apr. 24, 1963, 21 U.S.T. 77 (138a). By a letter deposited with the U.N. Secretary General on March 7, 2005, the United States has withdrawn from the Optional Protocol, and is no longer subject to its provisions. *See* http://travel.state.gov/news/news_2155.html (last visited January 24, 2006). The Experts merely assert their opinion that the United States' withdrawal from the Protocol was incorrect, without citing any authority. ICJ Experts *Amicus* Br. at 19-20.

And even if the United States remained a party to the Optional Protocol, it would be inappropriate under the Constitution for the

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immediately to the appropriate diplomatic or consular mission.")).

Court to recognize as binding the decision of a judicial body not recognized in the Constitution. The "judicial Power" discussed by the Constitution encompasses the duty to exercise the final say in the interpretation of federal law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 777 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Under the Experts' interpretation, as a result of signing the Vienna Convention, the "judicial Power" has been placed not in "one supreme Court," but instead divided between this Court and the ICJ. To recognize the ICJ's judgments as binding would, pursuant to the actions of only the President and the Senate, effect a fundamental change in the constitutional structure.

Nothing in the President's foreign-affairs and treaty power allows a reordering of the judicial functions of the Article III courts that would otherwise be barred by the Constitution. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870) ("[A] treaty cannot change the Constitution."). The Optional Protocol, even when it remained in effect, could not have transformed the ICJ's decisions into federal law. That result would encroach on the judicial system of the United States, and would elevate the power of the ICJ far beyond that provided by its statute and the U.N. Charter.

2. The ICJ's jurisdiction is limited to disputes between consenting nations, and its decisions are enforceable only through the Security Council.

The ICJ's decisions in *Avena* and *LaGrand* should not be applied by this Court in construing the Vienna Convention. The U.N. Charter and the ICJ's statute together delineate the scope of the ICJ's authority. The ICJ can hear only disputes between nations, and then only when those nations have consented to the ICJ's jurisdiction. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34, 111, 59 Stat. 1055 (1945). ICJ decisions have binding force only between the parties, which must be sovereign nations, and only with respect to the particular dispute, *id.* art. 59. Indeed, the ICJ

statute specifies that, in all other instances, decisions of the court have "no binding force."[13] *Id.*

As a result, the ICJ cannot declare individual rights. Its decisions have no *res judicata* effect on disputes between individual persons. *See, e.g., Socobel v. the Greek State*, 30 Avril 1950, 18 I.L.R. 3. ICJ judgments are "final and without appeal," but there is no rule regarding the application of those decisions before other tribunals. ICJ STATUTE art. 60.

Nor does the ICJ have direct enforcement powers. Instead, the Security Council enforces ICJ judgments in its discretion. Article 94 of the U.N. Charter explicitly provides that all disputes regarding ICJ decisions are to be referred to the U.N. Security Council. U.N. CHARTER art. 94. Thus, while there exists in principle an obligation to respect the ICJ's judgments, ultimate enforcement power is given not to the ICJ—which in effect has authority merely to make declarations that include the scope of damages resulting from a breach of international law—but to the Security Council which exercises the political and institutional authority to enforce the ICJ's decisions.

Significantly, no nation has ever inferred from Article 94(1) an obligation to enforce ICJ decisions as domestic law.[14] Indeed, this

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13. *Amici* ICJ Experts sole argument on this point is that the limitation does not apply to ICJ decisions because the ICJ itself has chosen to ignore it. ICJ Experts' *Amicus* Br. at 25-26.

14. Although many foreign cases are unreported, the only case the *amici* States' research has uncovered where a domestic court arguably applied an ICJ decision was in French-controlled Morocco (a legal entity no longer extant). *See Administration des Habous v. Deal*, 19 I.L.R. 342 (Morocco, Ct. App. Rabat. 1952)—a decision later rejected by a tribunal in French-controlled Tunisia, *see Mackay Radio & Tel. Co. v. Lal-la Fatma Bent si Moahamed el Khadar et al.*, 21 I.L.R. 136 (Tangier, Ct.

interpretation of the enforceability of the ICJ's decisions in U.S. courts was expressly rejected byt he D.C. Circuit in *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (CADC 1988) (Mikva, J.) (quoting *Diggs*, 555 F.2d, at 851 (CADC 1976)): "[T]he words of Article 94 'do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.'" The ICJ Experts implicitly recognize this in their brief—rather than offer a legal basis for their argument, they rely upon their assessment of the United States' "economic and political interests." ICJ Experts *Amicus* Br. at 17-19 & n.30.

The ICJ's statute confirms that its decisions have not created rights judicially enforceable by individuals. The ICJ's decisions have binding force only between the parties and with respect to their particular case. See ICJ STATUTE art. 59. Only Nations may be parties in cases before the ICJ, *id.*, at art. 34, ¶1. The ICJ's decisions cannot, by its statute, apply in litigation regarding individuals. *See Comm. of United States Citizens Living in Nicaragua*, 859 F.2d, at 938 (U.N. Charter's provisions "make clear that the purpose of establishing the ICJ was to resolve disputes between national governments. We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government."); *see also Socobel*, 18 I.L.R. 3 (ICJ judgments cannot have *res judicata* effect in domestic courts because there is no identity of parties); *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280, 290-91 (D.D.C. 1952) (refusing to give controlling effect to ICJ ruling).

App. Int'l Trib. 1954).

C. The Court Should Not Defer to the ICJ Out of Comity.

The dissent in *Medellin v. Dretke* suggested that an issue facing the Court was whether to accord judicial comity to the ICJ's decisions. 125 S.Ct. 2088, 2092-93 (2005) (per curiam). There is no basis for extending judicial comity to the ICJ: comity is not automatically extended to foreign tribunals *qua* tribunals; instead, it is a voluntary observance of the right of foreign nations to regulate their own affairs. *See Hilton v. Guyot*, 159 U.S. 113, 166 (1895). Applying comity is "a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another." *Somportex Ltd. v. Philadephia Chewing Gum Corp.*, 453 F.2d 435, 440 (CA3 1971). More specifically, "judicial comity" is a doctrine whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, *e.g.*, *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 423 (1866), as distinguished from "prescriptive comity," the respect sovereign nations afford each other by limiting the reach of their laws, *e.g.*, *F. Hoffman-La Roche v. Empagram S.A.*, 124 S.Ct. 2359, 2366-67 (2004); *see also* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another").

Neither form of comity should apply to the ICJ, which does not represent the political choices of a sovereign, but instead constitutes a dispute-resolution mechanism which ultimately culminates in a political—rather than a legal—resolution of diplomatic disputes. Judicial comity is simply inapposite to this case, because the interpretation of treaties is in the Court's own jurisdiction. A treaty is federal law. This Court has full competence to construe it according to its terms—and need not look to a foreign tribunal for guidance. *See, e.g.*, *El Al Israeli Airlines*, 525 U.S., at 167-68 (construing rule of decision provided in Warsaw Convention); *cf.*

Hagen v. Utah, 510 U.S. 399, 422-23 & n.1 (1994). The situation is completely different from extending comity to a foreign sovereign's application of *its own law* in its own territory. When "judicial comity" is applied to another nation's laws, the decision is made on the basis of equality between sovereign nations. *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004) (discussing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-46 (1812)).

Additionally, although the ICJ's work often concerns treaties, it is tied to no political decision-making process—and to none of the accompanying political responsibilities—that would ensure that these "experts" had been given legitimate authority to impose their conclusions. *See Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2761 (2004) (the Court's authority to recognize legal standards arising in international law is limited to objectively established standards because the Court otherwise has no authority to adopt policy); *cf. id.*, at 2771-72 (Scalia, J. dissenting) (arguing that this standard is too lenient because it still gives courts authority to create law).

III. The Vienna Convention Does Not Preclude the Application of Virginia's Statutory Procedural-Default Requirements.

If the Court were to adopt a rule that Article 36 of the Vienna Convention both applies to criminal proceedings and is not subject to procedural default, it would be adopting a new rule of law. *Cf. Medellin*, 125 S.Ct., at 2091 (whether Article 36 bars procedural-default argument may constitute a "new rule").

Recognizing an exception to the procedural-default doctrine would be inconsistent with this Court's traditional recognition that it does not sit in review of the States' regulation of their own criminal-justice systems. The Court should not consider the policy arguments made by Petitioners and their *amici*—to do so would be to turn on its head the relationship between the federal and state

courts regarding criminal procedure, and the only basis for doing so would be a treaty that the Executive Branch believes should not be so applied.

A. Procedural Default Is an Adequate and Independent State Ground.

Procedural default is an adequate and independent ground support for the Virginia Supreme Court's judgment, *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court has already resolved that issue with regard to the Vienna Convention in *Breard*, holding that the procedural rules of the forum State, including rules on procedural default, govern implementation of the Vienna Convention. 523 U.S., at 375. The Court reasoned that this result was consistent with the background presumption of international law stating that the procedural rules of the forum State govern implementation of a treaty absent "a clear and express statement to the contrary." *Id.* Thus, Article 36 rights, if they exist, "shall be exercised in conformity with the laws and regulations of the receiving State," and Article 36(2) reinforced, rather than replaced, the procedural-default rule.

Bustillo relies on Article 36(2)'s requirement that laws of the forum state "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Bustillo Merits Br. at 36-38. But this reading presumes that the more general "full effect clause" overrides Article 36's more specific provision that the Convention will be applied "in conformity with" existing United States law. It cannot be that the more general provision creates a "clear and express statement" that the United States intended to change its own domestic laws by signing a treaty stating that the requirements of the Convention were to be enforced in compliance with existing law.

B. The Court Should Not Consider the Policy Arguments Advanced by Petitioners and their *Amici*.

The Court holds "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Philips*, 455 U.S. 209, 221 (1982). Nonetheless, Bustillo argues that the Court should preclude the application of procedural default on policy grounds; in short, suggesting that the Court change U.S. law because it will make the treaty function more efficiently and because the Court should follow the ICJ's "guidance" regarding the interpretation of Article 36. Bustillo Merits Br. at 37-50. The Court should not consider these policy arguments, because they are within the Executive Branch's discretion.

Appending additional procedural requirements onto Article 36 would violate the Court's own precedent regarding procedural default. Procedural default prevents the subsequent enforcement of even constitutional rights, which can likewise be defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (procedural default applies to *Miranda* claims); *Sykes*, 434 U.S. at 87 (procedural default applies to voluntariness claims). The application of that rule to constitutional claims does not mean that the constitution is not given full effect under United States law; the possibility that procedural default will be applied to Vienna Convention claims, likewise, cannot be sufficient to demonstrate that Article 36 is not being given full effect.

To rule for Petitioners, the Court would have to disregard its own opinions regarding the procedural-default doctrine in the context of federal habeas claims. The procedural-default rule is designed in part to eliminate the tactical benefit that might be derived from the stratagem of "sandbagging" by a criminal defendant. *Sykes*, 433 U.S., at 89. Rejecting the prior test of *Fay v. Noia*, 372 U.S. 391 (1963), which allowed federal habeas review for any claim absent a knowing and deliberate waiver of the claim,

the Court emphasized the importance of applying the "cause"and "prejudice" standard in cases involving the application of the contemporaneous-objection rule. *Sykes*, 433 U.S., at 89.

A broad rule preventing procedural default of Vienna Convention claims would be even broader than the now-repudiated standard in *Fay v. Noia*. Even in the case of "deliberate bypass," Bustillo argues that Vienna Conventions claims should remain available. *See* Bustillo Merits Br. at 36-38. Indeed, in Bustillo's State habeas proceedings, Virginia cited the testimony of Bustillo's defense counsel, who stated that he *affirmatively chose* not to involve the consulate in Bustillo's case. J.A., at 235. The choice not to invoke the Vienna Convention is the source of the current dispute. As a general matter, Vienna Convention claims would present particularly likely candidates for sandbagging, to the significant detriment of the judicial process. For defendants from nations whose consulates provide little assistance to nationals facing criminal prosecution, the upside to raising the claim is nominal. But, if the claim cannot be waived, defendants could go to verdict, hope for acquittal, and, if convicted, assert the claim and get yet another bite at the apple. Moreover, if Petitioners prevail, the result would call into question the convictions and sentences of potentially tens of thousands of defendants, capital and non-capital, throughout all 50 States.

CONCLUSION

The Court should affirm the judgments of the Oregon and Virginia Supreme Courts.

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IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent,

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE ALLIANCE DEFENSE FUND, AS *AMICUS CURIAE*, SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of the Alliance Defense Fund.[1]

The **ALLIANCE DEFENSE FUND** ("ADF") is a not-for-profit legal alliance organization. The ADF has 820 affiliated allied attorneys. Also allied with the ADF are numerous public interest law firms and organizations. In addition to engaging in direct litigation, the ADF provides litigation funding and training to organizations and attorneys protecting religious civil liberties.

ADF has advocated for rights of Americans under the United States Constitution in numerous significant cases throughout the United States, having been directly or indirectly involved in over 900 cases, including 42 cases before the United States Supreme Court.

The ADF works to preserve and protect religious liberty. It has particular knowledge helpful to the Court in this case concerning the social and legal impact of the authoritative use of international law.

CONSENT TO FILE BRIEF

Petitioners and Respondents, through their counsel of record, consented to the filing of all Briefs *Amicus Curiae* in this case. Their confirmations of global consent are on file with the Clerk of the Court.

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[1] In accordance with Supreme Court Rule 37(6), *amicus* certifies that this brief was authored entirely by Counsel of Record for *amicus* and that no part of the brief was authored by any attorney for a party. No person or entity other than *amicus curiae* or its counsel provided a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This Court, in resolving the instant issues, should not use International Court of Justice (ICJ) judgments as authoritative interpretative sources.

The ICJ lacked jurisdictional authority to discern individual rights judicially enforceable in American courts. In addition to lacking authority to render its judgment, a substantial amount of legal authority suggests the ICJ incorrectly concluded the Treaty creates individual rights enforceable in American Courts. Furthermore, authoritatively adopting the ICJ judgments will create an irreconcilable conflict with existing federal statutes and well-established constitutional doctrines of criminal procedure.

By asking this Court to authoritatively use the ICJ judgments in interpreting the Treaty, Petitioners seek to legitimize holdings of that tribunal as the rule of decision for American courts. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

To impose the ICJ's interpretation upon the United States subordinates and alters the United States Constitution. It deprives the Executive Branch of its right, under the U.N. Charter, to exercise discretion in choosing how to respond to a judgment of the ICJ. It also deprives Congress of its constitutional authority to legislate. By denying the politically accountable branches of this Nation the ability to carry out their respective roles under the Constitution, it surrenders sovereignty of the United States to an unelected

international body. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

Amicus curiae, therefore, urges this Court, not to rely upon the *LaGrand* and *Avena* decisions as authoritative interpretative sources.

ARGUMENT

Amicus curiae discuss why this Court should not use International Court of Justice (ICJ) judgments as authoritative interpretative sources in resolving the instant issues.

THIS COURT SHOULD NOT RELY UPON JUDGMENTS OF THE INTERNATIONAL COURT OF JUSTICE

Petitioners suggest it is proper for this Court, in resolving whether the Vienna Convention creates judicially enforceable individual rights, to rely on judgments rendered by the ICJ. (Pet'r. Br. Bustillo i, 29-31; Sanchez-Llamas i, 26-28). Petitioners are wrong.

A. THE INTERNATIONAL COURT OF JUSTICE (ICJ) DECISIONS IN *LaGrande* AND *Avena* ARE NOT ENTITLED TO RECOGNITION AND ARE NOT CONTROLLING

The United Nations adopted the Vienna Convention on Consular Relations and Optional Protocols on April 24, 1963. Vienna Convention on Consular Relations, *opened for signature* April 24, 1963, art. 36(2), 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention or "Treaty"]. The United States Senate ratified the Vienna Convention and the Optional Protocol concerning Compulsory Settlement of Disputes[2] on October 22, 1969. 115 Cong. Rec. 30,997 (1969).

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[2] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* April 24, 1963, art. 1, 21 U.S.T. 325, 596 U.N.T.S. 487, [hereinafter Optional Protocol].

This Court has stated that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court *with jurisdiction to interpret* [the treaty]" (emphasis added). *Breard v. Green*, 523 U.S. 371, 375 (1998). For the reasons discussed in this brief, however, the ICJ lacked jurisdictional authority to discern individual rights judicially enforceable in American courts. This Court should not, therefore, authoritatively use the *LaGrand* or *Avena* ICJ judgments as authoritative interpretative sources in resolving the instant issues.

In the *LaGrand* and *Avena* cases, signatory nations to the Vienna Convention brought actions against the United States in the International Court of Justice. Relying on the Optional Protocol for jurisdiction, the ICJ entered judgments ultimately holding that: (1) the Vienna Convention establishes individual rights for foreign nationals; (2) these individual rights are to be judicially enforced in American courts; and (3) American constitutional and statutory procedural default rules cannot bar judicial review of a foreign national's Vienna Convention Claim in American courts. *See Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 1 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

The ICJ in *Avena* made clear it intended its judgment to broadly apply as the rule of decision in all cases involving similarly situated foreign nationals in the United States. *Avena* at para. 151. The ICJ's position, and Petitioners' desire for this Court to adopt it in the instant case, must not stand. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

1. The ICJ lacked authority under the Optional Protocol to discern individual rights judicially enforceable in American courts.

Petitioners contend the Optional Protocol to the Vienna Convention provided the ICJ with jurisdiction to discern individual rights and prescribe that such rights be judicially enforceable in American courts. (Pet'r. Br. Bustillo 31; Sanchez-Llamas 26-27). The Optional Protocol actually states much less, merely providing that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." (Optional Protocol).

Article 34 of the ICJ Statute provides that "[o]nly *states* may be parties in cases before the court." Statute of the International Court of Justice, 59 Stat. 1055 (emphasis added). Article 59 of the ICJ Statute further indicates that "the decision of the court has no binding force *except between the parties* ~~and in~~ respect to that particular case." *Id.* (emphasis added). Thus, the ICJ has no power to announce the existence of individual rights, and its judgments can have no effect on a dispute involving an individual.

Moreover, the text of the Optional Protocol negates Petitioners' view that the Optional Protocol empowered the ICJ to create judicially enforceable individual rights. In this regard, the text in Article I of the Optional Protocol only permits a signatory State to participate in a dispute before the ICJ. (Optional Protocol). This jurisdictional limitation expressly precludes individuals from asserting rights of their own, or in any way participating in a case before the ICJ. The ICJ certainly, therefore, lacked authority under the

Protocol to divine individual rights from the shadows of the Vienna Convention during such a proceeding.

Moreover, nothing credible in the record suggests that the President's negotiation and the Senate's ratification of the Optional Protocol included surrendering the sovereignty of the United States to the ICJ. To be sure, as long as the United States remained a party to the Protocol, the politically accountable branches agreed to permit the ICJ to hear "[d]isputes arising out of the interpretation or application of the Convention." *Id.* Nothing in this plain language, however, authorized the ICJ to create individual rights under the treaty, or prescribe that such rights be judicially enforceable in American courts. Likewise, nothing in the plain language of the Optional Protocol authorized the ICJ to broadly extend this ruling to all consular notification cases in the United States.

Furthermore, Article 94 of the United Nations Charter provides the basis of a signatory State's obligation to comply with a judgment of the ICJ – not the Optional Protocol. U.N. Charter art. 94, para. 1, 59 Stat. 1051. In this regard Article 94 provides that an individual member of the United Nations must "undertake[] to comply with the decision of the International Court of Justice in any case to which it is a party." *Id.* The position of the United States is that the words, *undertakes to comply*

> [do] not constitute an acknowledgment that an ICJ decision will have immediate legal effect in the courts of U.N. members. Instead, it constitutes a commitment on the part of the U.N. members to take future action through their political branches to comply with an ICJ decision. U.S. Br. as *Amicus Curiae* at 34,

Medellin v. Dretke, 125 S.Ct. 2088 (2005) (No. 04-5928).

Thus, the source for this Nation's obligation to comply with an ICJ judgment is the U.N. Charter; and under that Charter, the fulfillment of Article 36 Vienna Convention obligations rests with the politically accountable branches of the United States, not the judiciary.

Since the U.N. Charter by design lacks specificity as to how a signatory State should comply with a judgment by the ICJ, it is fair to infer that the Charter vested the politically accountable branches of a signatory State with discretion in deciding how the nation will comply. Moreover, under the U.N. Charter, enforcement of a signatory nation's obligation to comply falls to the U.N. Security Council, not the ICJ. U.N. Charter Art. 94, para. 2. Unilateral dictates by the ICJ requiring compliance through immediate judicial review by a signatory State, deprives the politically accountable branches of this Nation of the right to exercise discretion pursuant to the U.N. Charter. Indeed, as far as your *Amici* is aware, no existing signatory State understands Article 94 of the Charter as imposing a requirement of compliance through the signatory nation's judiciary, independent of the politically accountable branches of government. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (holding that Article 94 of the U.N. Charter "does not confer rights on private individuals"). This is because Article 94 of the U.N. Charter envisaged situations where the politically accountable branches of a signatory State might exercise discretion not to comply with a judgment of the ICJ; in such a situation seeking remedial satisfaction in the UN Security Council is the only alternative. U.N. Charter Art. 94, para. 2

Thus, the ICJ's judgments calling for enforcement of a Treaty obligation, via immediate judicial review in the signatory state, are acutely inconsistent with the enforcement process in the U.N. Charter. Indeed, the ICJ's position unacceptably renders Article 94 of the U.N. Charter meaningless.

Enforcement of treaty provisions does not fall within the purview of international tribunals. This is because "[a] treaty is primarily a compact between independent nations." *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598 (1884). Thus, a treaty depends "on the interest and honor of the governments which are parties to it" for enforcement. *Id.* In the *Avena* case, the President chose to comply with the ICJ's judgment "by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005). The President grounded his compliance not in any authority of the ICJ, but in the executive power of Article II of the United States Constitution. *Id.*

At the same time the President complied with the judgment in the *Avena* case, the President chose to protect the Nation from future judgments based on *Avena's* faulty legal principles. The President accomplished this purpose by withdrawing the United States from the Optional Protocol. *See* Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (March 7, 2005) (notifying the Secretary-General of the United States withdrawal from the Optional Protocol) [hereinafter *U.S. Letter of Rescission*].

The President's rescission from the Optional Protocol powerfully demonstrates Executive Branch intent not to

surrender sovereignty to an international tribunal (i.e., by subjecting itself to erroneous judgments improperly rendered without authority).

2. The ICJ Incorrectly Concluded that the Treaty Creates Individual Rights Judicially Enforceable in American Courts

In addition to lacking authority to render its judgment, significant support exists suggesting the ICJ was incorrect in concluding that the Treaty creates individual rights judicially enforceable in American Courts. To ascertain whether a treaty confers a right on individuals, this Court looks to the text of a treaty, just as it would with a statute. *U.S. v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Thus, a court construing treaty provisions must do so in accordance with established rules of statutory construction. *Id.* In this regard, this Court looks to the plain language of the treaty. *Id.*

It is certainly questionable whether the ICJ, in reaching its conclusions, evaluated the plain language of the Treaty. If the purpose of the Treaty is, as the ICJ suggests, creation of judicially enforceable individual rights, then key portions of the Treaty's text are a meaningless nullity. For example, the Treaty Preamble plainly states that the purpose of the privileges and immunities in the Treaty is "[to] contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems . . . ." Vienna Convention, Preamble. Creating judicially enforceable individual rights out the shadows of the Treaty, has nothing to do with developing friendly relations among nations with very different systems. Neither does coercing such judicially enforceable individual rights on a signatory State. Indeed, the recent rescission of the United States as a signatory State to the Optional Protocol,

demonstrates just how incompatible the ICJ's position is with the actual purpose of facilitating diplomatic relations expressed in the text.

Moreover, the plain language of the Treaty Preamble goes on to expressly state "the purpose of such privileges and immunities *is not to benefit individuals* but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *Id.* (emphasis added).

Article 36 is located in Chapter II of the Treaty and is entitled "Facilities, Privileges and Immunities Relating to Consular Posts." Vienna Convention, Chapter II.[3] Article 36 states the obligations of signatory nations relevant to Petitioners' claims in this case. On their face, those provisions relate to facilitating consular activity in receiving states and seem, therefore, to confirm the general purpose stated in the Preamble.[4] Significantly, Article 36 resides in

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[3] The title of Chapter II of the Treaty is: "Facilities, Privileges and Immunities Relating to Consular Posts, Career Consular Officers and Other members of a Consular Post." Vienna Convention, Chapter II.

[4] The pertinent part of Article 36 provides: 1. *With a view to facilitating the exercise of consular functions relating to nationals of the sending State*:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have

the section relating to consular posts, and not the section concerning facilities, privileges and immunities of individuals (i.e., members of the consular post) (compare Vienna Convention, Chapter II, sections I and II).

The ratification history of the Vienna Convention likewise corroborates the view that the Treaty did not create individual rights judicially enforceable in American courts. State Department testimony during ratification hearings provided that the Treaty "does not have the effect of overcoming federal or State law beyond the scope long authorized in existing consular conventions." *See U.S. v. Li*, 206 F.3d 56, 64 (1st Cir. 2000) (en banc) (referring to State Department statements).

During the ratification process, the State Department's testimony furthered emphasized that the Treaty's purpose was "not to benefit individuals." Sen. Doc Exec. E, 91st Cong. 1st Sess. (1969) (referring to the Treaty Preamble). When the Senate Committee on Foreign Relations transmitted the Treaty to the full Senate for ratification, the Committee Chair included a short report; this report indicated that the Committee believed that the Treaty "does not change or affect present U.S. laws or practice." *Id.*

Several federal circuits and state courts have concluded that the Vienna Convention does not create individual rights that a defendant may assert in a criminal proceeding. *See, e.g., U.S. v. Duarte-Acero*, 296 F.3d 1277,

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the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (emphasis added).

1281-82 (11th Cir.); *U.S. v. De La Pava*, 268 F.3d 157, 164-65 (2d Cir. 2001); *U.S. v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *U.S. v. Jimenez-Nava*, 243 F.3d 192, 198 (5th Cir.); *Li*, 206 F.3d at 60-66 (1st Cir. 2000) (en banc); *see also Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002); *State v. Navarro*, 659 N.W.2d 487, 493 (Wis. Ct. App. 2002); *State v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001).

Additionally, the President's removal of the United States, as a signatory State to the Optional Protocol, confirms the Executive Branch view that the Vienna Convention does not create individual rights judicially enforceable in American courts. Indeed, the Executive Branch "has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right." U.S. Brief as *Amicus Curiae* at 22-23, *Medellin v Dretke* 125 S.Ct. 2088 (2005) (No. 04-5928); U.S. Brief at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390).

The State Department, in the *Li* case, advised that the Treaty established rights and obligations between signatory nations, not individual rights. *Li*, 206 F.3d at 63 (citing to State Department statements). Other State Department statements as early as 1970 provided that the Treaty would not require significant departures from existing practice. *Id.* at 64. Finally, the State Department expressly indicated that: "The [only] remedies for failures of consular notification under the [Vienna convention] are diplomatic, political, or exist between states under international law." *Id.* at 63. Because the President serves as the "sole organ of the federal government in the field of international relations," *U.S. v. Curtiss-Wright*, 299 U.S. 304, 320 (1936), this Court should give the Executive Branch's understanding of the Treaty in this case "great weight." *U.S. v. Stuart*, 489 U.S. 353, 369 (1989).

B. AUTHORITATIVELY ADOPTING THE ICJ JUDGMENT CREATES AN IRRECONCILABLE CONFLICT WITH EXISTING FEDERAL STATUTES AND WELL ESTABLISHED CONSTITUTIONAL DOCTRINES OF CRIMINAL PROCEDURE

The ICJ decision creating individual rights, and prescribing judicial enforcement of such rights in American courts, failed to consider the federal nature of our Nation's constitutional structure. The Constitution's Supremacy Clause provides:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (emphasis added).

Petitioner Bustillo contends that ICJ's version of the Treaty is the Supreme Law of the Land. (Pet'r. Bustillo Brief at 16-20, 29-31, 45). Citing the Supremacy Clause, he argues the ICJ's version of the Treaty (creating judicially enforceable rights without regard to procedural default rules) must prevail over a state habeas statute barring claims, if not first raised in the state trial court. *Id.* Adopting the ICJ judgment as the authoritative "rule of decision" in state habeas cases, however, would create an irreconcilable conflict with existing federal habeas statutes and firmly fixed constitutional doctrines of criminal procedure involving procedural default. It is this irreconcilable conflict to which we now turn.

"[A]bsent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard,* 523 U.S. at 375 (1998) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988)); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988); and *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539 (1987)).

Indeed, "the Vienna Convention itself" permits and embodies American state and federal law's procedural default principle by expressly providing that Convention rights "'shall be exercised in conformity with the laws and regulations of the receiving State'" so long as "'said laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" *Breard,* 523 U.S. at 375 (citing and quoting Vienna Convention, *supra*, 21 U.S.T. at 101).

In *Breard v. Greene,* this Court held that the procedural default rules, developed under the United States Constitution, accomplish those purposes–and that Vienna Convention claims, like Constitutional claims, can be procedurally defaulted. 523 U.S. at 375. The now axiomatic rule developed by this Court under the United States Constitution is that claims of error in criminal proceedings "must first be raised in state court in order to form the basis for relief in habeas," whether in capital or other cases. *Breard*, 532 U.S. at 375 (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)).[5]

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[5] Several federal and state courts properly relied on *Breard* to require (as a prerequisite to obtaining review) a showing of prejudice, such as proof that the violations impacted trial or deprived a defendant of a constitutional right. *See, e.g., U.S. v. Ortiz*, 315 F.3d 873, 878 (8th Cir. 2002); *U.S. v. Minjares-Alvarez*, 264 F.3d 980, 986-87 (10th Cir. 2001); *U.S. v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000); *U.S. v.*

Congress reinforced those procedural default rules when, subsequent to the ratification of the Treaty, it enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, Apr. 24, 1996, 110 Stat. 1214. *Breard,* 532 U.S. at 376. Under this statute, a federal habeas petitioner, claiming his incarceration violates "treaties of the United States," generally is not entitled to an evidentiary hearing where he "fail[s] to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2) (1994).

Although Petitioner is correct that treaties are the Supreme Law of the Land, so, too, is the Constitution itself, as well as an Act of Congress. *Breard,* 523 U.S. at 376. Moreover, this Court has repeatedly held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Id.* at 376 (citing and quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion)) (citing also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating when treaty and federal statute conflict, "the one last in date will control the other")).

While the Vienna Convention was adopted in 1969, Congress subsequently enacted, and the President signed, the AEDPA in 1996. A petitioner's "ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Breard,* 523 U.S. at 376. No substantial, constitutional basis exists on which to alter it. *See* Sandra Day O'Connor, *Federalism of*

Cordoba-Mosquera, 212 F.3d 1194, 1196 (11th Cir. 2000); *U.S. v. Pagan*, 196 F.3d 884, 890 (7th Cir. 1999); *U.S. v. Ademaj*, 170 F.3d 58, 67-68 (1st Cir. 1999).

Free Nations, in International Law Decisions in National Courts 13, 19 (Thomas M. Franck & Gregory H. Fox eds., 1996) (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (stating that "the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question") (noting "Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal 'the essential attributes of judicial power. . . .'")).

Thus, the United States Constitution and Acts of Congress (as interpreted by decisions of this Supreme Court and enacted subsequent to the ratification of the Vienna Convention) have Supremacy over the contrary decisions of the ICJ (creating judicially enforceable rights without regard to procedural default rules).

Because Petitioner Bustillo's Vienna Convention claim was procedurally defaulted under a state statute and not the AEDPA, however, he contends that ICJ's version of the Treaty is the Supreme Law of the Land. (Pet'r. Br. Bustillo at 16-20, 29-31, 45). Bustillo, therefore, argues that under the Supremacy Clause, the ICJ's version of the Treaty must prevail over state procedural default rules (barring claims if not first raised in state trial court). *Id.* at 16-20, 29-31, 45. Bustillo's proposed resolution therefore, creates an irreconcilable conflict with the existing Federal AEDPA statute and the well established constitutional doctrine of criminal procedure concerning procedural default.[6]

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[6] Bustillo's position lacks merit. Although the ICJ judgments come later in time than the AEDPA, such decisions do not constitute a superseding subsequent enactment since they merely involve the review by an international tribunal of a prior enactment. Moreover, while the Supremacy Clause may include treaties, it nowhere encompasses a mere

Petitioners' briefs either fail to address this problem or dismiss it as irrelevant. See, e.g., Pet'r Br. Bustillo at 45.

Following Petitioners' proposed course would improperly allow views of an international court, lacking entitlement to recognition, to prevail over those of our own citizens. Any decision by this Court concerning the continued constitutional efficacy of state procedural default rules should, therefore, consider how the rule of decision rendered will affect similar procedural default rules in future *federal* habeas cases.

We also note that implementing the ICJ version of the Treaty unfairly gives charged foreign nationals more rights than charged American citizens on habeas. Indeed, under the ICJ version of the Treaty, nothing prevents a charged foreign national from strategically holding back any Vienna Convention claim until after trial (with or without the effective assistance of competent counsel).

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opinion by the ICJ, since such an opinion is not a *treaty*. U.S. Const. art. VI, cl.2.

C. DEFERRING TO THE ICJ DECISIONS FOR THE RULE OF DECISION IN THIS CASE SURRENDERS AMERICAN SOVEREIGNTY AND HAS POTENTIAL TO CREATE A CONSTITUTIONAL CRISIS OF EPIC PROPORTIONS.

The American people trust their courts to faithfully interpret the expression of the popular American will and resolve their disputes fairly under the rule of law. It is this trust of the people, standing alone, that gives legitimacy to a federal court's power of judicial review. Thus, in a constitutional republic dividing power between an elected executive, an elected legislature, and an independent judiciary, the continued legitimacy of democratic institutions rests in part on the unelected judiciary not usurping the power of politically accountable branches of government.

In this regard, the facts of this case create the potential for a constitutional crisis of epic proportions. Here, Petitioners ask an unelected Supreme Court to reject well-established American constitutional and statutory law as the rule of decision in this case. In its place, Petitioners suggest that this Court deem as the Supreme Law of this Land, an unelected foreign court's judicial promulgation. Such a course surrenders the sovereignty of the United States to the International Court of Justice and interferes with the right of politically accountable branches to govern under the rule of law.

Nowhere in the history of our nation has a court of justice attempted to assume so much power in American government as the ICJ did in the *La Grand* and *Avena* judgments. When this Court decides whether to rely on the judgments of the ICJ here, *amicus* asks this Court to consider that no politically accountable President appointed anyone on that tribunal. Likewise, no politically accountable Senator voted to confirm anyone on that tribunal. By asking this

Court to authoritatively use the ICJ judgments in interpreting the Treaty in the instant case, Petitioners seek to legitimize it as the rule of decision for American courts. This approach, however, extra-constitutionally allows an international body to shape law binding the American people. In this regard, Petitioners ask this Court to do nothing less than to surrender American sovereignty.

The use of foreign authorities strikes at the founding bargain made by the American people. The American people at no time subordinated themselves to an international sovereign on domestic issues and have fought wars to avoid being subordinated to European or foreign authorities.

Petitioners cite to the Federalist Papers, and other constitutional history, to justify their desire for this Court to rely upon the ICJ judgments creating individual rights judicially enforceable in American courts. *See* Pet. Br. Bustillo at 16-17; Sanchez-Llamas at 35-36. Reliance on foreign precedents, however, actually conflicts with the structure and history of the U.S. Constitution.

James Madison expressed his wonder at the considerable extent to which the Philadelphia Convention reached agreement on the Constitution with these words: "It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our belief in the critical stages of the revolution." *The Federalist* No. 37 at 236-238 (James Madison) (J.E. Cooke ed., 1961). Indeed, the adoption of the Constitution signified the people's acceptance of a moral view of government. The natural sovereign authority the Constitution affords to these United States, as a part of that moral view, should not be disturbed.

Indeed, the Constitution gives no indication that the people intended under these truths to grant ultimate power to those who would divine law from the statements of non-representative international bodies. The people ceded only those natural rights which any people must cede so as to vest a necessary government with adequate powers. *The Federalist* No. 2, at 8 (John Jay) (J.E. Cooke ed., 1961). The Founders further recognized those powers were limited by "the transcendent law of nature and of nature's God . . . to which all such institutions must be sacrificed," *The Federalist* No. 43, at 297 (James Madison) (J.E. Cooke ed., 1961).

Thus, it is apparent throughout *The Federalist* that the United States Constitution was written with a particular view in mind of ordinary principles of causality – that certain motives and opportunities of constituent interests ought (in view of the nature of man) to be treated by certain forms of government. The judicial submission of the American people to an international rule of decision, to which neither political branch has on its own submitted, is not part of those Constitutional principles.

The perils of the judiciary submitting the United States to the authority of international norms which the political branches have not adopted or authorized are many and well-documented. World judicial systems are immensely varied, creating "promiscuous opportunity" to cite authority for whatever propositions the courts wish. Richard Posner, *No Thanks, We Already Have Our Own Laws,* Aug. 2004 Legal Affairs 40, 41; John Leo, *Creeping Transnationalism*, U.S. News & World Report, July 21, 2003, at 58 (observing a problem with judges defying American law by spotting "emerging world consensus"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L.J. 193, 217, 219-220 (2003)

(proposing that international comparative analysis overturns American legal culture and constitutionalism).

Citation of foreign decisions becomes "one more form of judicial fig-leafing" of which we have too much already, when the real influences on judicial decision-making have nothing whatever to do with the study of foreign decisions. Posner, *supra,* at 42. Indeed, foreign decisions "emerge from a complex socio-historical-politico-institutional background" of which federal judges "are almost entirely ignorant." *Id.* Courts are not all pursuing the same enterprise. A federal court interpreting the United States Constitution may not be doing anything like that which a foreign court does interpreting different documents. *See* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69, 73 (2004) (noting that this practice threatens to undermine constitutional law).[7] American constitutional law and international human rights law emerge from distinctly different source material. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 Va. J. Int'l L. 913, 919 (2004).

For instance, relying on foreign authority to declare new fundamental constitutional rights shatters prior prudential constraints on substantive due process theories. *Id.* at 925 (citing Robert C. Post, *Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L.

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[7] Professor Ramsey gives the example that the *Dudgeon* European court which this Court cited in *Lawrence v. Texas*, 539 U.S. 558 (2003), was deciding whether an anti-sodomy provision was "necessary" within the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, whereas this Court in *Lawrence* was deciding whether Texas's anti-sodomy law was "reasonable" under the Constitution. Ramsey, supra. at 73-74.

Rev. 4, 96 (2003)). This Court has clearly, and repeatedly, held that treaties cannot supersede individual rights protected under the United States Constitution. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (upholding First Amendment freedoms); *Reid v. Covert*, 354 U.S. 1 (1957) (upholding Sixth Amendment rights). If this Court cedes part of the Constitution in the instant case, it might expect new petitioners before this Court citing international norms to stifle free expression of religious views, and the free exercise of religion in general.

Citation of foreign decisions certainly is counter to popular rule by the people and undemocratic. Posner, *supra* at 42; Roger P. Alford, *Misusing International Sources to Interpret the Constitution,* 98 Am. J. Int'l L. 57 (2004). In fact, citation of foreign decisions is often an express strategy of law professors and interest groups to find "a more sympathetic set of interpretive sources than existed domestically." Ramsey, *supra* at 70 (citing Harold H. Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1109-1129 (2002)).

Because the Court does not have the institutional resources and skills to engage in its own comparative and empirical analysis of international sources, it relies unduly on misshapen advocacy. *See* Alford, *Misusing International Sources*, *supra* at 64-65. Selection of foreign sources then becomes non-empirical and even arbitrary except in relationship to the desired outcome.[8] Ramsey, *supra* at 72-73. Moreover, the choice of issues on which to employ comparativism is itself unprincipled and, therefore, seems directed to the Court's ends. *See* Alford, *Misusing International Sources*, *supra* at 67-68 (2004) (citing Mary

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[8] Professor Ramsey queries why the Robinson brief on which this Court relied in *Lawrence* cited the law of Israel rather than India, for instance. *Id.* at 73.

Ann Glendon, *Abortion and Divorce in Western Law* 24-25, 145-54 (1987) (noting that, comparatively speaking, the United States' abortion policy is singular among all of the world's countries)). "Gone are decisions that turn on objective facts or value judgments of others. What matters is the Court's own conception of liberty."[9] Alford, *Federal Courts, supra* at 925. Enumeration of rights created by international tribunals not only abandons the Constitution's text and history but also the experience and history of the Nation. Alford, *Federal Courts, supra* at 926.

[9] Professor Alford also mentions Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), writing of a jurisprudence "where judges . . . felt free to roam where unguided speculation might take them." Alford, *Federal Courts, supra* at 925 n.78.

CONCLUSION

By the adoption of the Constitution the American people ceded certain of their inviolable natural rights to the government. The people did not, however, cede those rights to foreign judges exercising authority inconsistent with that authorized by the people's representatives and the Constitution itself.

Here the ICJ had no authority to discern individual rights judicially enforceable in American courts. Yet, in the face of substantial contrary legal authority, the ICJ did so. This Court should, therefore, reject Petitioners' invitation to anoint the ICJ's judicial promulgation as the Supreme Law of this Land. Moreover, authoritatively adopting the ICJ judgments will create an irreconcilable conflict with existing federal statutes and well established constitutional doctrines of criminal procedure. Given that the politically accountable branches of the American government hold a very different understanding of the Treaty's terms than the ICJ, heeding Petitioner's request is an especially inappropriate course for this Court.

To impose the ICJ's interpretation on the United States subordinates and alters the United States Constitution. It deprives the Executive Branch of its right, under the U.N. Charter, to exercise discretion in choosing how to respond to a judgment of the ICJ, and deprives Congress of its constitutional authority to legislate. By denying the politically accountable branches of this Nation the ability to carry out their respective roles under the Constitution, it also surrenders the sovereignty of the United States to an unelected international body. Neither the United States Constitution, nor the natural law of nations on which it was founded, permit such an extraordinary result.

For these reasons, your *amicus curiae* urges this Court, not to authoritatively rely upon the *LaGrand* and *Avena* decisions as interpretative sources.

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Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the Supreme Courts of the State of Oregon and Commonwealth of Virginia

BRIEF OF AMBASSADOR L. BRUCE LAINGEN *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are either U.S. citizens who have benefited from consular assistance abroad or suffered in its absence; attorneys or diplomats familiar with the importance of consular assistance; or organizations dedicated to the interests of U.S. citizens abroad.

Ambassador L. Bruce Laingen served in the United States Foreign Service from 1949 to 1987. His tours of service included assignments in Germany, Iran, Pakistan, and Afghanistan. He served as U.S. Ambassador to Malta from 1977-1979. In mid-1979, he returned to Iran for a second term as Chargé d'Affaires of the American Embassy before being held hostage in the Iran Hostage Crisis from November 4, 1979 to January 20, 1981. During the Hostage Crisis, the United States sought and secured a judgment against Iran from the International Court of Justice based on Iran's violation of the Vienna Convention on Consular Relations. Ambassador Laingen holds the Award for Valor from the Department of State, as well as the Distinguished Public Service Medal from the Department of Defense.

Thomas R. Dawson served as a Peace Corps volunteer in Iran in 1966. On the way to attending a Peace Corps Conference in September of that year, Mr. Dawson and a fellow volunteer decided to explore the shore of the Caspian Sea in Astara, Iran, which was close to Soviet territory. Mr. Dawson unwittingly crossed over the unmarked border into Soviet territory, and he was promptly

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[1] Counsel for all parties have consented in writing to the filing of this brief; those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to the preparation and submission of this brief.

captured by armed soldiers, taken into custody, and interrogated for several days. He repeatedly pleaded with his captors to allow him contact with the American consulate, but to no avail, until the tenth day of his captivity when he was finally allowed contact with American officials. Mr. Dawson was eventually released to Iranian authorities, who delivered him to the American embassy in Tehran. Mr. Dawson completed his service in the Peace Corps in Micronesia, without further incident, and lives, with his wife, on Kent Island in Maryland. He owns and operates an art gallery in Annapolis.

Billy Hayes is a filmmaker, producer and writer based in Los Angeles, California. Mr. Hayes spent five years in a Turkish prison during the 1970s, an ordeal described in his book, *Midnight Express*, which was made into a feature motion picture by the same name. Prompt notification of the U.S. Consulate ensured that Mr. Hayes was able to retain a lawyer, while regular consular visits throughout his incarceration provided an essential and reliable link to the outside world.

Richard Atkins practices law in Philadelphia, Pennsylvania, and has specialized for more than twenty years in assisting American citizens who run afoul of the law in foreign countries. He has testified before the Senate Foreign Relations Committee on international prisoner transfer agreements and wrote a guide to prisoner transfer treaties for the United Nations. Approximately a thousand incarcerated Americans abroad have been freed or returned with his assistance.

William D. Rogers served as Assistant Secretary of State for Inter-American Affairs from 1974-1976, and Under Secretary of State for Economic Affairs from 1976-1977. During his lengthy career as a diplomat, he played a key role in Secretary of State Kissinger's negotiations to end white

rule in Rhodesia (now Zimbabwe), participated in the final Panama Canal Treaty negotiations, was special emissary for President Carter to El Salvador in 1980, co-chaired the Bilateral Commission on the Future of U.S. Mexican Relations, and was Senior Counsel to the National Bipartisan Commission on Central America. He has also served as President of the Center for Inter-American Relations in New York, and as President of the American Society of International Law.

Founded in Geneva in 1978, **American Citizens Abroad** (ACA) is a non-profit, non-partisan organization dedicated to serving and defending the interests of U.S. citizens living outside the United States. ACA works closely to assist the U.S. Government in developing cohesive national policies dealing with Americans overseas. The organization has members in over 90 countries worldwide.

Established in 1973, the **Association of Americans Resident Overseas** (AARO) is a volunteer, non-partisan service organization representing the interests of more than 4.1 million Americans living and working abroad. Its mission is to ensure that Americans resident overseas are guaranteed the same rights and privileges as their U.S. counterparts. AARO has worked to change U.S. laws and policies so that Americans abroad receive the same benefits and protection as citizens in the United States.

Founded in 1931, the **Federation of American Women's Clubs Overseas** (FAWCO) is a non-partisan network of 78 independent organizations in 37 countries, with over 15,000 members. FAWCO is a non-profit U.S. corporation and a recognized NGO with special consultative status to the UN Economic and Social Council. Among its stated purposes is to defend the rights of all Americans overseas.

While *amici* take no position on the ultimate merits of the underlying criminal cases, they urge that the failure by the lower courts to give a vigorous and robust scope to the protections of the Vienna Convention on Consular Relations will ultimately, and inevitably, endanger the welfare of United States citizens abroad.

SUMMARY OF ARGUMENT

Every year, a significant number of United States citizens traveling or living overseas find themselves ensnared in the criminal justice system of a foreign government. Consular assistance provides a vital service to these Americans, maintaining a desperately needed link to the outside world, and helping them navigate and understand an unfamiliar, and perhaps hostile, legal system.

The United States played a leading role in creating Article 36 of the Vienna Convention on Consular Relations, which ensures that consular officers will be allowed to perform this important service. Article 36 depends in the first instance on the right of an individual detainee to be notified of the right to seek consular assistance. It obligates Member States to notify foreign detainees of that right, and to permit their consuls to have access to and to assist the detainees. But if officials in this country fail to provide foreign nationals with the full benefit of the Article 36 provisions on consular assistance, beginning with the individual detainee's right of notice, it is inevitable that U.S. citizens abroad will soon suffer a similar, reciprocal fate. Indeed, nothing presents a greater threat to consular assistance to Americans abroad than the failure to respect foreign nationals' reciprocal right to assistance in this country.

The United States also played a leading role in drafting the Optional Protocol Concerning the Compulsory

Settlement of Disputes, which established the compulsory jurisdiction of the International Court of Justice in disputes involving parties to the Convention. The United States has frequently recognized the International Court of Justice (ICJ) as a proper forum to adjudicate disputes between states. In fact, it has invoked the jurisdiction of the World Court more often than any country in the world. Of particular significance to this dispute, the United States brought an action in 1979, following the Tehran hostage crisis. The action challenged, *inter alia*, Iran's failure to comply with Article 36 of the Convention.

The failure by the lower courts to give full effect to the provisions of Article 36 – including in particular, the detainee's right of notice – is inconsistent with the leading role of the United States in creating the Convention. It is also at odds with its frequent resort to the jurisdiction of the ICJ, which has recognized the notice right. More ominously, if the judgment below is allowed to stand, it is inevitable that U.S. citizens abroad will soon suffer in kind.

ARGUMENT

I.

The United States Played A Leading Role In Developing The Legal Protections Provided By Both The Vienna Convention And the Optional Protocol

The United States has long recognized what can scarcely be gainsaid: the Vienna Convention on Consular Relations (Convention)[2] provides vital safeguards to persons imprisoned by a contracting State.[3] But equally clear, and no

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[2] April 24, 1963, 21 U.S.T. 77, 596 UNTS 261.

[3] *See, e.g.*, Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, I.C.J. Pleadings 1980, p.

less important, is the leading role the United States played in securing these essential protections. Both the Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol)[4] are substantially the product of U.S. leadership.

The Convention codified the pre-existing law on consular relations between States, an area that had previously been regulated "mainly by bilateral agreements or other less formal arrangements and by national laws."[5] In that respect, the Convention brought unity to this multiplicity by forging a single, global agreement on consular relations, thereby "contribut[ing] to the promotion of friendly relations between nations."[6] The United States actively participated in creating this agreement, and took a substantial part in

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174 ("A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."); U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* http://www.state.gov/s/l/16139.htm ("Consular notification of and access to a detained or arrested U.S. citizen has long been crucial to providing basic protective services abroad.... Protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.")

[4] April 24, 1963, 21 U.S.T. 325, 596 UNTS 487.

[5] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 41 (hereinafter "Report").

[6] *Id.*

drafting Article 36, the text of which was agreed to "after much debate."[7]

Significantly, the provision of consular assistance under Article 36 depends at the outset on the detained individual's notice right. As the Report of the U.S. Delegation to the United Nations Conference on Consular Relations notes, Article 36(1)(b) requires that "[arresting] authorities shall inform the person concerned without delay of his rights under this sub-paragraph."[8] The Conference described this requirement as "not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[9]

While the Convention represents an important codification of the obligation to provide consular notification, the United States has recognized that consular notification, beginning with notice to the detained individual, is not dependent upon the legal protections of the Convention alone:

> Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, *in all cases, the minimum requirements are to*

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[7] *Id.* at 59.

[8] Convention, art. 36(1)(a).

[9] Report at 60. Elsewhere, the Report notes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice." *Id.* at 74.

> *notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.*[10]

In addition to providing leadership in codifying consular rights and obligations in the Convention, the United States played an integral role in drafting the Optional Protocol, which provides in relevant part that any "[d]isputes arising out of the interpretation or application of the Convention *shall* lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the Present Protocol."[11] Indeed, this language derives substantially from the original proposal of the United States, which provided that "[a]ny dispute arising from the interpretation or application of this Convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon."[12] At the Conference, the United States voted *against* a motion by the Yugoslav delegation that would have weakened the

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[10] Bureau of Consular Affairs, U.S. Department of State, Consular Notification and Access, Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them 44 (no date of publication available; "[t]he Department of State expects to update [the publication] every 2-5 years"), *available at* http://travel.state.gov/law/consular/consular_744.html (emphasis added).

[11] Protocol, art. 1 (emphasis added).

[12] Report at 72.

compulsory jurisdiction of the ICJ.[13] While the final language of the Protocol is slightly different than the language proposed by the United States, it clearly provides for the compulsory jurisdiction of the ICJ, precisely as urged by the United States.

That the United States would have argued so assiduously for an Optional Protocol that provided for the compulsory jurisdiction of the ICJ should come as no surprise. the United States has been involved in more cases at the ICJ than any other nation in the world, and has invoked the jurisdiction of the World Court more often than any other State.[14] Two such actions, however, are of particular interest to *amici*.

On November 19, 1951, a C-47 cargo aircraft of the 85th Air Depot Wing of the U.S. Air Force carrying four American airmen was making a routine flight from Erding Air Force Base in Germany to Belgrade, Yugoslavia. During the flight, the plane accidentally crossed into Hungarian airspace and was "brought down by Soviet authorities in Hungary and subsequently turned over with its crew to Hungarian authorities."[15] American authorities searched in

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[13] The Yugoslav delegation proposed adding a paragraph to the U.S. proposal, providing that "[a]ny contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1, of this article [the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation." *Id.* at 73.

[14] The official website for the ICJ lists all cases from 1946 to the present. *See* http://www.icj-cij.org/icjwww/idecisions.htm (last visited Dec. 21, 2005).

[15] Press Release, United States Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident (Dec. 10, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

vain for the missing fliers until December 2, 1951, when Russia's *Tass* news agency revealed that the aircraft and its crew had been in Hungarian and Soviet custody since its disappearance.[16] Although U.S. State Department officials immediately sought the release of the fliers, Hungarian officials would not permit it, nor, despite repeated requests, would they let American officials speak with the men.[17]

On December 23, 1951, Hungary announced that the four men had been tried by a Hungarian military court and sentenced to a fine of almost $30,000 each, or three months imprisonment, for "intentionally violating the Hungarian border."[18] "The trial was secret, and the United States was

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[16] *Budapest v. U.S.*, N.Y. Times, Dec. 9, 1951, at 168 *available at* http://www.il.proquest.com/proquest/ (ProQuest Historical Newspapers, N.Y. Times (1851-2000)); *see also, U.S. Promises Action to Free Seized Fliers*, Washington Post, Dec. 4, 1951, at 1, *available at* http://www.il.proquest.com/proquest/(ProQuest Historical Newspapers, Washington Post (1877-1988)):

> Also expected is a protest over the fact that the Communist authorities kept silent for nearly two weeks while search planes combed Yugoslavia... Press Officer Lincoln White said at the State Department that the Soviet charges are 'apparently a cover-up for the fact that despite repeated representations by the American Chargé d'Affaires at Budapest, George Abbott, requesting information concerning the plane, the Hungarian authorities repeatedly said they had no information.

[17] Press Release, U.S. Department of State, U.S. Seeks Release of American Fliers Held in Hungary (Dec. 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[18] *U.S. Air Crew Fined, Hungarian Border "Violation," 30,000 Dollars Each*, London Times, Dec. 24, 1951, at 4, *available at* http://www.galegroup.com/Times/ (Times of London Digital Archive, 1785-1985).

given no opportunity to be present through any representative...."[19] In a speech given to the United Nations the following year, Senator and U.S. Representative to the General Assembly Theodore Green observed:

> What concerns us most here is the stubborn and implacable manner in which both Soviet and Hungarian officials refused U.S. representatives' repeated requests for access to the airmen. Not only this, but both our diplomats and the airmen were prevented from obtaining their own legal counsel in the trial which took place.[20]

Hungary released the American airmen on December 28, 1951. Upon their release, the United States promptly closed the Hungarian consulates in New York and Cleveland and barred Americans from traveling to Hungary.[21] Secretary of State Dean Acheson placed the blame for this retaliation squarely upon Hungary's failure to "live up to the accepted standards of international practice with regard to

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[19] Press Release, U.S. Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident (Dec. 19, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

[20] Statement by Senator Theodore F. Green, U.S. Representative to the General Assembly, United States Department of State, Soviet Harassment of Foreign Diplomats (Oct. 29, 1952), *in* 27 Department of State Bulletin 787 (1952).

[21] Press Release, U.S. Department of State, U.S. Orders Closing of Hungarian Consulates (Dec. 29, 1951), *in* 26 Department of State Bulletin 7 (1952).

the right of consular officers to exercise protective functions in behalf of nationals of their country."[22]

The incident also provided the occasion for this country's first litigation in the World Court. On March 17, 1954, the United States initiated proceedings at the ICJ against Hungary and the Soviet Union, claiming the failure to allow consular access and assistance had deprived the United States and its citizens of their respective rights to provide and receive consular assistance. "International law," the United States correctly observed, "recognizes the right of the government in such matters to act on behalf of its nationals and is applied in Hungarian judicial practice."[23]

Significantly, the cases against Hungary and the Soviet Union could not proceed because those countries refused to accept the World Court's jurisdiction. Upon the removal of the case from the ICJ's docket, the United States lamented:

> This conduct on the part of the two defendant Governments merely demonstrates again that they have no compunctions in publicly asserting principles of international law and order but in then refusing to permit those principles to be applied to their own conduct. *The U.S. Government must of course accept*

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[22] Press Release, U.S. Department of State, Statement by Secretary Acheson (Dec. 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[23] Application Instituting Proceedings and Pleadings (U.S. v. Hungary; U.S. v. U.S.S.R.), 1953 I.C.J. Pleadings, (*Treatment in Hungary of Aircraft and Crew of United States of America*) Annex I at 36 (Feb. 16, 1954).

the decision of the International Court of Justice.[24]

The United States again turned to the ICJ in 1979 when it submitted an application instituting proceedings against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[25] In its application, the United States accused Iran of several treaty violations, including violations of Article 36 of the Convention, and requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to secure the release of all United States nationals currently being detained."[26] The ICJ indicated provisional measures to be taken by Iran on December 15, 1979, and entered a final judgment in favor of the United States on May 24, 1980. Thereafter, the United States insisted the decisions of the ICJ were binding in all respects, and that Iran must comply with the Court's judgment.[27]

The significance that the United States has attached to the jurisdiction and authority of the ICJ is particularly

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[24] Press Release, U.S. Department of State, U.S. Applications in C-47 Case Removed From Calendar of ICJ (July 16, 1954), *in* 31 Department of State Bulletin 130 (1954) (emphasis added).

[25] *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 I.C.J. 3 (Judgment of 24 May).

[26] *Id.* at 6.

[27] *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

relevant here, as that Court, in its *Avena* Judgment, declared that Article 36 confers upon foreign detainees an individual legal right to be notified of the right to inform their consulates of their arrest and to have any communication to their consuls forwarded without delay.[28] The ICJ further declared that U.S. violations of Article 36 should be given effect in judicial proceedings.[29]

In sum, the United States' prominent role in drafting the Convention, including Article 36, its leadership in

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[28] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶¶ 40 (citing *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 494), 61 & 106(1).

[29] *Id.*, ¶¶ 113-14, 121, 140-41. *See also id.* ¶ 151 ("To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention .... In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.").

The United States' withdrawal from the compulsory jurisdiction of the ICJ in no way lessens the weight of this ruling. The United States has not suggested that the ICJ was not properly exercising its jurisdiction in issuing the *Avena* Judgment and, indeed, has affirmatively indicated that it intends to comply with that judgment. *See* Press Statement by Adam Ereli, Deputy Spokesman, U.S. Department of State (Mar. 10, 2005) ("we remain a party to the Vienna Convention, we remain committed to fulfilling its provisions and we stand by it.... in recognition of the optional protocol and our international commitments, the President has determined that the United States will comply with the judgment of the International Court of Justice."); *see also Jogi v. Voges*, 425 F.3d 367, 383-84 (7th Cir. Sept. 27, 2005) (withdrawal from the Optional Protocol is a prospective action only, with "no effect on disputes that were tendered to and finally decided by the ICJ before the withdrawal.").

establishing the compulsory jurisdiction of the ICJ, and its frequent resort to the ICJ's jurisdiction all counsel a result here that is consistent with the ICJ's judgment. The individual notice right and other rights set out in Article 36 should be enforceable in the courts of this country.

II.

Failure To Provide Vigorous And Robust Enforcement Of The Vienna Convention Could Have Grave Consequences For U.S. Citizens Abroad

The integrity of the international legal system, which has no independent enforcement mechanism, depends on the acceptance of mutual obligation. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. Reciprocity is thus an inescapable necessity and the bedrock that underlies the foundational principle of international law – *pacta sunt servanda* ("pacts must be respected") – that nations must honor their agreements in good faith.[30] In matters both mundane and monumental, membership in the international community implies a solemn obligation to comply with treaties in good faith, "undertaking to do (or not to do) unto others what they would have done (or not done) unto them."[31]

In the present context, the importance of reciprocity cannot be overstated. Over the last 30 years, the number of Americans living overseas has increased dramatically. The

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[30] *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 321 cmt. a (1987) (*pacta sunt servanda* "lies at the core of the law of international agreements and is perhaps the most important principle of international law.")

[31] Louis Henkin, *How Nations Behave* 30 (2d ed. 1979).

State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[32] The State Department also reports that over 2,500 Americans are arrested abroad annually.[33] And this total does not include the number of citizens detained outside the formal criminal justice process. All told, roughly 6,000 Americans are arrested or detained abroad every year.[34] The largest number of these – 400 – are detained in Mexico, home country of petitioner Sanchez-Llamas.[35]

These statistics demonstrate that many U.S. citizens, at one time or another, will find themselves overseas in need of legal help, and they teach that a failure to provide foreign nationals in the United States with vigorous and robust enforcement of the Vienna Convention could have grave consequences for U.S. citizens abroad. As U.S. jurist Stephen M. Schwebel, President of the International Court of

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[32] Bureau of Resource Management, U.S. Department of State, *FY 2003 Performance and Accountability Report* (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm

[33] Office of Overseas Citizens Services, Bureau of Consular Affairs, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* www.international benefits.com/travel-tips/overseas-citizens-services.htm.

[34] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm. (Kevin Herbert is from the Office of Overseas Citizens Services, U.S. Department of State).

[35] Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/std/1998/98-04-15.std.html.

Justice, stated of the requirements of Article 36, "the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States."[36]

This risk to U.S. citizens is a matter of persistent concern. The State Department Foreign Affairs Manual instructs American consuls abroad to secure "immediate [consular] notification, no matter what the language of applicable treaties legally requires."[37] Apart from ensuring the timely provision of legal information, prompt notification and access "is necessary to forestall physical abuse of the prisoner ... or to ascertain when such abuse has occurred."[38] American consuls are required to determine if there has been "any physical abuse or violation of rights"[39] and to look for signs of ill-treatment, bearing in mind that "many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence."[40] Consular officers also arrange for detainees to be "examined by a private medical doctor to determine the extent and probable cause of any injury"[41] when appropriate and observe "the physical

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[36] *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998, Order of 9 April, Declaration of President Schwebel.

[37] U.S. Department of State Foreign Affairs Manual (1984), 7 FAM 411.3, *Relations with Local Authorities*.

[38] *Id.*, 7 FAM 412, *Access*.

[39] *Id.*, 7 FAM 414.1, *Abuse of Prisoners*.

[40] *Id.*, 7 FAM 414.1-1, *Examination by an Officer*.

[41] *Id.*, 7 FAM 414.1-2, *Examination by Independent Physician in Cases of Abuse*.

conditions under which the prisoner is being held."[42] Finally, the consulate is required by law "to assist U.S. citizens abroad who, as a result of their incarceration, cannot secure the minimal medical treatment or dietary regimen necessary to sustain an acceptable standard of life."[43]

The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of the Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[44]

On another occasion, Secretary Albright noted that the State Department stood ready to provide a range of assistance to Americans detained abroad, including

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[42] *Id.*, 7 FAM 414.2, *Conditions of Detention.*

[43] *Id.*, 7 FAM 451, *General Policy (Emergency Medical and Dietary Assistance).*

[44] S. Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

"attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings."[45] She has also cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[46]

U.S. consular officers overseas have been instructed to insist on scrupulous observance of Article 36 rights, in order to carry out their "primary mission" of protecting Americans:

> If we are to be effective in protecting the rights of U.S. citizens detained or otherwise in distress abroad, we must first know their situation and we must be vigilant in personally assisting them. By consistently protesting violations of notification and access obligations, we reinforce with the host government the seriousness with which we take our consular responsibilities and

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[45] Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Parols, quoted in footnote 211 of the Memorial of Mexico, *Case Concerning Avena and Other Mexican Nationals*, I.C.J. Pleadings (2003), *available at* www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[46] Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to Virginia Governor James Gilmore).

> underscore our efforts to protect our citizens against any abuse, mistreatment or discrimination.[47]

Secretary Albright's position is neither surprising nor unusual. Other State Department officials have voiced the same sentiment.[48] Most recently, William H. Taft, IV, the Department's former Chief Legal Advisor, observed in a letter to the Oklahoma clemency officials presiding over the recent case of Osbaldo Torres, Article 36 of the Convention "is not only of importance to foreign nationals in the United States. It serves to protect all Americans who travel or live

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[47] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, *supra*, fn. 3.

[48] For example, State Department Spokesman James P. Rubin stated that "[c]onsular notification is no less important to [other countries] than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html. State Department Spokesman R. Nicholas Burns captured perfectly the obligation imposed by reciprocity:

> A lot of American citizens who are tourists ... find themselves in trouble, find themselves ill or in prison because they didn't understand the legal system or they came crosswise with the system, and the only people they can turn to for help are American diplomats. So it's critically important to the average American – and millions of Americans travel overseas every year – that they have Americans who can help them when they get into trouble. It happens all the time.

Press Statement by R. Nicholas Burns, Spokesman, U.S. Department of State (Sept. 29, 1995), *available at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

abroad."[49] The Executive has further emphasized the importance of reciprocal compliance in its determination that the *Avena* Judgment be given full effect in the state courts. "Consular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international legal obligations to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected."[50]

Robust enforcement of the Vienna Convention is not merely the concern of Executive officials. On the contrary, the law of unintended consequences in this field has been the subject of frequent judicial comment. In *Standt v. City of New York*, for example, the Court observed:

> The United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access.... It is critical for the judiciary to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad.[51]

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[49] S. Lynne Walker, *Okla. case pits U.S. against world court*, San Diego Union-Tribune, May 7, 2004 (quoting Mr. Taft's letter to the Oklahoma Pardon and Parole Board), *available at* http://www.signonsandiego.com/uniontrib/20040507/news_n7penalty.html .

[50] Brief of the United States as *Amicus Curiae* at 51, *Medellín v. Dretke*, 125 S.Ct.2d 2088 (2005).

[51] 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

Judge Butzner, of the Fourth Circuit Court of Appeals, expressed a similar sentiment during the *Breard* litigation:

> United States citizens are scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that international law is founded upon mutuality and reciprocity.[52]

In another case, one jurist asked, perhaps only rhetorically:

> Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. government official we ought to remember these cases.[53]

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[52] *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner J., concurring) (internal quotations omitted); *see also U.S. v. Carillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999) (Treaty violations not only undermine the 'Law of the Land,' but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.").

[53] *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999) (Chapel, J., concurring in result); *see also id.* (court's narrow vision of the Convention "puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials.").

Organizations with members most affected by a restrictive interpretation of the Convention have also voiced their concerns. The Southern Baptist International Mission Board, for example, oversees 4,200 missionaries and 15,000 volunteers in 130 countries. The president of the organization noted his concerns in urging former Virginia Governor George Allen to commute the sentence of an inmate on Virginia's death row. "I am horrified to think of the potential repercussions in Mexico and other countries, and its potential harm to our missionaries' that could occur because the Commonwealth of Virginia failed to honor the obligations of the Vienna Convention."[54]

The danger to U.S. citizens, though perhaps more pronounced in these turbulent times, does not arise solely from the random acts of rogue states, as a recent incident in China makes plain. Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.[55] She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[56] This incident prompted the House of

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[54] Frank Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, Sept. 17, 1997, at A1.

[55] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://www.csmonitorservices.com/csmonitor/archivesearch. jhtml.

[56] *See id.*

Representatives to pass House Resolution 160, unanimously condemning the acts of the Chinese government.[57]

In sum, *amici* stake their argument on the mutually binding obligations of international treaties. Responsible officials in this country have repeatedly expressed the concern that a failure to honor Article 36 presents grave risks to American citizens living and traveling abroad. The Founders expressed a similar concern when they foresaw what has eluded the lower courts in these cases: membership in the international community implies reciprocal obligations and benefits.[58] The obligations at issue here begin with a judicially enforceable individual right of notice, as set out in Article 36. While the reciprocal obligations of Article 36, if honored, imply burdens that this country must bear, they also, by a like reciprocity, stand to benefit its citizens most. We urge the Court to recognize those obligations today.

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[57] H.R. Res. 160, 107th Cong. (2001).

[58] *The Federalist No. 64*, at 392 (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[59] Application for membership to the bar of the Supreme Court of the United States pending.

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No. 05-51

IN THE

Supreme Court of the United States

MARIO BUSTILLO,

Petitioner,

v.

GENE JOHNSON,
Director, Virginia Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The International Court of Justice ruled in *LaGrand* and *Avena* that procedural default rules should not be used to block United States courts' review and reconsideration of the convictions and sentences of foreign nationals who were denied their rights to consular notification and access to consular services under Article 36 of the Vienna Convention. In light of those decisions, Amicus will discuss the following questions:

1. Does the withdrawal from the Optional Protocol to the Vienna Convention affect the implementation of the *LaGrand* and *Avena* holdings in the United States?

2. Does the requirement that courts in the United States give Article 36 its full effect prohibit state courts from using procedural bars to deny claims of defects in consular notification and access on collateral review of foreign national defendants' convictions and sentences?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to this Court's Rule 37.3, *amicus curiae* American Bar Association ("ABA" or "*amicus*") respectfully submits this brief in support of the position that the United States' obligations under the Vienna Convention, part of the "supreme Law of the Land," preclude states from using procedural bar rules to avoid hearing Article 36 claims on collateral review of foreign national defendants' convictions and sentences.

STATEMENT OF INTEREST

The ABA is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 405,000 attorneys spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

Among the ABA's goals are "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition" and "advanc[ing] the rule of law in the world."

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1. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

2. Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA has long recognized the importance of promoting and adhering to mechanisms for the peaceful resolution of international disputes. In 1947, the ABA House of Delegates adopted a policy recommending that the United States "in order to further the administration of international justice . . . refer[] all international questions or disputes susceptible of being decided on the basis of law, which cannot be settled by direct negotiations, to the International Court of Justice or to arbitral tribunals." 72 REPORTS OF THE AMERICAN BAR ASSOCIATION 102-03 (1947). In the same year, the ABA House of Delegates adopted a resolution expressing the ABA's "great satisfaction" that the United States had accepted the jurisdiction of the International Court of Justice "as binding upon it." *Id.* at 377.

The ABA House of Delegates reaffirmed its support for deferring to the International Court of Justice when it adopted a policy in 1994 recommending that the United States Government present a declaration recognizing that the International Court of Justice has "compulsory" jurisdiction in all legal disputes concerning "the interpretation of a treaty," "any question of international law," or "the nature or extent of the reparation to be made for the breach of an international obligation."

In 1998, the ABA House of Delegates adopted a resolution specifically recognizing the importance of complying with the Vienna Convention on Consular Relations and urging "federal, state, territorial and local law enforcement authorities to adopt a warning of rights similar to the '*Miranda*' standard, advising foreign nationals of their right to consular assistance pursuant to Article 36 of the Vienna Convention."

Consistent with both its position with respect to the Vienna Convention and the United States' international obligations, as well as its concern with promoting meaningful access to the justice system, the ABA has adopted guidelines for attorneys representing foreign nationals. *See* Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National, adopted by the House of Delegates in February 2003. The

guidelines instruct that at every stage of a case, counsel "should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals." Unless predecessor counsel has already done so, an attorney representing a foreign national is instructed to "immediately advise the client of his or her right to communicate with the relevant consular office," to "obtain the consent of the client to contact the consular office," and then to immediately contact the consular office to inform it of the client's detention or arrest.

Although Petitioner Bustillo did not receive a capital sentence, the ABA recognizes that the issues decided in this case will have wide ranging consequences for foreign nationals who face or have received death sentences.[3] The ABA has expressed misgivings about the use of state procedural bars to dispose of federal habeas claims in capital cases. In 1990, the ABA House of Delegates adopted a resolution that in death penalty cases:

> [f]ederal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to

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3. While the ABA takes no position on the death penalty as a general matter, it has repeatedly voiced its acute interest in the fair and competent representation of defendants in capital cases. In 1989, the ABA House of Delegates adopted Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Guidelines"), which was designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel. *See also* ABA Standards for Criminal Justice: Providing Defense Service Standards, Standard 5-1.2 cmt. at 12 (3d ed. 1992) ("These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function ("ABA Prosecution Function and Defense Function Standards"), Standard 4-1.2(c) (3d ed. 1993) ("Defense counsel should comply with the [ABA Death Penalty Guidelines].").

> raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

The ABA appears as *amicus curiae*, as it also did in *Medellin v. Dretke* when this Court last considered the obligations of the United States under the Vienna Convention, because the questions presented in this case have serious implications for the stability of the rule of law throughout the world and for the effective representation of foreign nationals prosecuted in American courts and Americans prosecuted in foreign courts.

SUMMARY OF ARGUMENT

In 1963, at the height of the Cold War, the United States signed the Vienna Convention on Consular Relations. Apr. 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"). Article 36 of the Convention guarantees to all United States citizens abroad and to foreign nationals in this country that if they are arrested outside their home country: (1) law enforcement officials will tell them without delay that they may have their nation's consul informed of their arrest, and (2) if they consent to notification, the law enforcement entity will promptly advise the consul of their arrest. The United States played a leading role in negotiating the wording of Article 36. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61. To ensure the faithful and consistent application of these important protections, the United States also proposed and advocated for the dispute settlement provision that became the companion Optional Protocol. *Id.* at 72-73. The Optional Protocol provides for compulsory jurisdiction by the International Court of Justice ("ICJ") over all signatory nations to resolve any disputes concerning the interpretation of the Convention's provisions. *See* Optional Protocol, 21 U.S.T. 325, art. I.

Once the Vienna Convention and Optional Protocol were ratified by the Senate, they became binding on the United States as a whole and, under the Supremacy Clause, preemptive of any conflicting state laws. Nevertheless, when Virginia law enforcement officers arrested Mr. Bustillo, a Honduran national, they did not inform him of his right to consular notification. Pet. for Cert. at 3. Mr. Bustillo was therefore unable to take advantage of the valuable assistance that consular officers can provide to defendants charged with serious crimes. For example, consular officers will often visit the foreign national soon after he is detained, provide a list of qualified local attorneys, and relay requests for material aid to family members in the home country. *See id.* (noting a declaration submitted by the Honduran consulate detailing the assistance it would have rendered); *see also* United States Department of State, Bureau of Consular Affairs, *Assistance to U.S. Citizens Arrested Abroad*, *available at* http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html. In addition, consular officers may help navigate local bureaucracies, explain the local legal system and its requirements, and provide support during trial proceedings by attending court sessions. *See Assistance to U.S. Citizens Arrested Abroad.*

Virginia's failure to alert Mr. Bustillo of his right to consular assistance or to notify the Honduran consulate directly of Mr. Bustillo's arrest had particularly dire consequences for Mr. Bustillo's case. Mr. Bustillo was charged with the first-degree murder of James Merry. Mr. Bustillo's defense was that the murder was perpetrated by a man nicknamed "Sirena"—now known to be Julio Osorto. *See* Pet. for Cert. at 2. Sirena, who like Mr. Bustillo is a Honduran national, fled the United States for Honduras the day after Mr. Merry died. *Id.* Mr. Bustillo's counsel could obtain only limited information about Sirena and his whereabouts by the time of trial, which allowed the prosecution to attack the credibility of Mr. Bustillo's defense. *Id.*

If Virginia had carried out the consular notification requirements of Article 36, the Honduran Consulate could have provided the critical information about Sirena that Mr. Bustillo's defense counsel was unable to obtain. *See id.* at 3 (describing the information the Honduran Consulate could have provided had it been notified of Mr. Bustillo's detention). Without access to this information Mr. Bustillo could provide only a silhouette of Sirena to the jury, which allowed the prosecution to impeach Mr. Bustillo's account of the crime in a manner that would not have been possible had Virginia law enforcement officials carried out their federal obligation to inform the Honduran Consulate of Mr. Bustillo's detention.

The United States admits that Mr. Bustillo's Article 36 rights were violated and it has apologized to Honduras for the violation. *Id.* Nevertheless, Virginia's courts provided no remedy for the violation and declined even to consider the substantive issue of whether Mr. Bustillo's trial was actually prejudiced by the federal violation. Instead, the courts disposed of Mr. Bustillo's state habeas petition on the grounds that Mr. Bustillo had procedurally defaulted his Vienna Convention claim by failing to raise it in the first instance. *Id.* This approach defies the ICJ's express interpretation of Article 36, which forbids procedural default rules from being employed to bar substantive consideration and enforcement of the Vienna Convention. That interpretation is the definitive interpretation of the treaty under the Optional Protocol. On two occasions the ICJ has held that invoking procedural default doctrines to dispose of Article 36 claims is itself a violation of the Vienna Convention. *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (March 31) ("*Avena*") ¶¶ 112-13; *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("*LaGrand*"). In *Avena*, the ICJ also held that, despite typical procedural default rules, United States courts must provide review and reconsideration of the

convictions and sentences tainted by the violations it had found.[4]

Although the Executive Branch has since unilaterally announced that the United States was withdrawing from the Optional Protocol, the ICJ entered judgment in the *Avena* and *LaGrand* decisions while the United States was still a party to the Optional Protocol. The United States' willing submission to the jurisdiction of the ICJ to interpret the Vienna Convention means that the principles identified in *Avena* and *LaGrand* are entitled to deference in defining the mutual obligations of the United States as a continuing party to the Vienna Convention. While a withdrawal from the Optional Protocol might allow the United States to implement its own interpretation of the Vienna Convention when future issues arise, it would severely undermine our domestic and international commitment to the rule of law and endanger Americans arrested abroad to decline to submit to an ICJ interpretation after pledging to do so.

Moreover, adhering to the ICJ's interpretation of Article 36 in state habeas cases like Mr. Bustillo's would avoid undue delay and expense in assuring enforcement of rights under

4. The *Avena* Judgment built on and strengthened the ICJ's earlier judgment in the *LaGrand Case*, a case brought by Germany against the United States also alleging violations of the Vienna Convention. (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("*LaGrand*"). Unlike in *Avena*, by the time the ICJ ruled in *LaGrand*, both of the German nationals in question had been executed. The ICJ held in *LaGrand* that: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) applying procedural default rules to prevent detained individuals from challenging their convictions and sentences on the ground that their rights under Article 36 of the Vienna Convention had been violated itself violated the Vienna Convention; and (3) if the United States failed to comply with Article 36 in future cases involving German nationals subjected to severe penalties, it must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand*, ¶¶ 77, 90-91, 125.

the Vienna Convention. This approach would also spare the federal courts from having to wade into murky questions of reconciling the ICJ's admonishment not to utilize procedural default doctrines with the deferential standards that federal courts traditionally apply to state procedural rules in habeas proceedings. *See Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (per curiam opinion accompanying order dismissing writ as improvidently granted). Unlike the limits on federal habeas jurisdiction imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which as an act of Congress is "on a full parity" with a treaty, *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion), state procedural default rules are not the "supreme Law of the Land." U.S. Const. art. VI. State courts have a constitutional obligation to enforce federal law rather than state law to the extent the two conflict—and state procedural rules are no exception. Given the concerns expressed by this Court in *Medellin* about squaring the decisions in *LaGrand* and *Avena* with the demands of AEDPA, limiting the use of procedural bars in state collateral proceedings may be the only viable means of ensuring that the consular notification provisions of Article 36 will be given their full effect.

This Court has acknowledged that claims that are analogous to the failure to notify a consulate, such as ineffective assistance of counsel, can so infect direct proceedings that they are better suited to collateral review. *See Massaro v. United States*, 538 U.S. 500, 504 (2003). Thus, implementing the *LaGrand* and *Avena* decisions by precluding the use of judicially created procedural bars in state collateral proceedings will channel consular notification claims to the most appropriate forum for resolution.

Enforcing federal obligations under the Vienna Convention in state post-conviction proceedings will not unduly encroach on state courts. As an initial matter, adopting a rule forbidding the use of procedural bars for consular notification claims will lead to increased compliance with the Vienna Convention. This compliance by local law enforcement will keep Article 36 claims

out of court in the first instance. It is also likely that criminal defendants will have to show prejudice from the consular notification defect to obtain some form of collateral relief. Because not all defendants will be able to make this showing, the obligations of the United States to its treaty partners may be satisfied with minimal administrative burden in many cases.

ARGUMENT

I. Giving effect to the ICJ's authoritative interpretation of Article 36 in *LaGrand* and *Avena* in the context of state habeas proceedings is necessary to ensure compliance with the guarantee of consular access to which the United States committed by ratifying the Vienna Convention.

By ratifying the Vienna Convention, the United States committed to the consular notification and access provisions of Article 36. The United States Department of State, realizing the importance of ensuring reciprocal compliance by other nations, recently confirmed the Executive Branch's commitment to securing the rights created by Article 36. *See* United States Department of State, *Announcement: All Consular Notification Requirements Remain in Effect*, *available at* http://travel.state.gov/news/news_2155.html ("The U.S. is fully committed to compliance with our international legal obligations under the [Vienna Convention], and actively works to improve compliance nationally."). Nevertheless, effective notification for detained foreign nationals of their Article 36 rights remains stubbornly elusive.[5] For several reasons, this disparity between our

5. Studies of consular notification practices have found that in capital cases, law enforcement officials complied with the requirement of Article 36 in less than five percent of cases. *See* Mark Warren, Human Rights Research, *Foreign Nationals and the Death Penalty in the United States* (May 28, 2005), http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (finding that notification occurred in 7 out of 160 capital cases). In non-capital cases, performance has been even more dismal—notification took place in four cases out of an estimated 53,000 cases in New York City during 1997. *Id.*

international treaty obligations and the ineffectiveness of law enforcement officials in carrying out those legal commitments demands that this Court implement the ICJ's decisions in *Avena* and *LaGrand* by prohibiting state courts from applying procedural default rules to block Vienna Convention claims.

First, the ICJ's decisions provide remedies for the failure to inform detained foreign nationals of their consular rights. Without these remedies, local law enforcement officials can ignore the international legal obligations of the United States without consequence. *But see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). The requirement of notifying foreign nationals of their consular notification rights places a bureaucratic burden, albeit a slight one, on local law enforcement officials. These officials will continue to avoid this burden unless there are ramifications for failing to provide appropriate notice.

Second, as this Court noted in *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (per curiam opinion accompanying order dismissing writ as improvidently granted), there are some potential problems with reconciling the ruling of the ICJ in *Avena* with the limitations AEDPA places on federal habeas proceedings. For example, the Court discussed in *Medellin* the possibility that a violation of consular access provisions is a "nonconstitutional lapse[] we have held not cognizable in a [federal] postconviction proceeding." *Id.* at 2090 (quoting *Reed v. Farley*, 512 U.S. 339 (1994)). The Court also noted that the non-constitutional nature of the treaty violation might impede the grant of a certificate of appealability, as required by 28 U.S.C. § 2253(c). *Id.* at 2091. The Court also suggested

that a federal habeas petitioner might encounter obstacles to showing that a violation of Article 36 is the type of "new rule" that can overcome the substantial showing articulated in *Teague v. Lane*, 489 U.S. 288 (1989).[6] *Medellin*, 125 S. Ct. at 2091. While there are reasons to believe that a criminal defendant could overcome these obstacles, it would demand substantial effort and would present many difficult legal questions to attempt to fit Article 36 claims into federal habeas proceedings in the first instance. *Id.* (explaining potential difficulties with reconciling the *Avena* Judgment with the demands of federal law).

The structural source of these difficulties is the "full parity" between treaties and federal statutes. *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion). These types of laws have the same status under Art. VI of the Constitution—they are both the "supreme Law of the Land." Reconciling countervailing commands from coequal sources of law can give rise to vexing problems of interpretation. *See, e.g., United States v. Dion*, 476 U.S. 734, 738-40 (1986) (discussing the wide variation in standards used to determine whether a statute conflicts with a treaty).

This problem vanishes when a treaty and state law contain conflicting commands—the treaty trumps state law. *See Baker v. Carr*, 369 U.S. 186, 212 (1962) ("Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law.").

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6. There are two reasons to believe that *Teague* does not present any barriers to petitioner's case, which comes to this Court on direct review of state habeas proceedings. First, *Teague* is a rule of *federal* habeas review and this Court has never applied *Teague* to state habeas review. *See* Reply Br. of Pet'r at 3-6 (citing cases). Second, the respondent raised the *Teague* argument for the first time in its petition for certiorari, so it is accordingly waived. *Id.* at 6-7.

The Constitution imposes a clear, independent obligation on states to enforce federal law in their own courts absent an express exemption from Congress. *See Tafflin v. Levitt*, 493 U.S. 455, 469-70 (1990) (Scalia, J., concurring) ("[T]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State.") (quoting *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876)). Accordingly, states *must* recognize and implement treaties even if they are inconsistent with the laws of a state. *United States v. Pink*, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement.").

Given the potential difficulties with using federal habeas proceedings to give effect to Vienna Convention rights and the cleaner option of delegating enforcement to state courts, this Court should ensure the availability of the remedies on state habeas for detained foreign nationals. Otherwise, the United States will continue to be out of compliance with the Vienna Convention. This would attenuate the reciprocal guarantee of consular notification rights and would endanger Americans detained abroad. As this Court has observed: "One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the . . . rights of a country's own nationals when those nationals are in another country." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941). The framers of the Vienna Convention designed the treaty to enable countries to help their own nationals when those nationals are abroad, in part by agreeing to allow other countries to take similar steps where their citizens are concerned. If the United States fails to meet its mutual

obligations under the Vienna Convention as they have been interpreted by the ICJ, it risks losing its ability to insist that other countries abide by their obligations to respect the consular rights of American citizens on their soil.

The United States routinely demands that it receive notice when its citizens are detained by foreign authorities. The State Department in fact requires consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. *See* 7 Foreign Affairs Manual § 426.2-1 (2004), *available at* http://foia.state.gov/masterdocs/07fam/07m0420.pdf. The United States cannot expect other countries to respect its citizens' consular rights, however, if the United States does not honor the reciprocal rights of those countries and their citizens in the face of state procedural impediments.

II. The ICJ's authoritative interpretations of Article 36 in *LaGrand* and *Avena* should endure beyond the post-judgment decision to withdraw from the Optional Protocol.

The Optional Protocol to the Vienna Convention originated as a proposal by the United States to ensure faithful and consistent application of the Convention's protections. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 72-73. The Optional Protocol gives the ICJ compulsory jurisdiction over all signatory nations to resolve disputes over the interpretation of the Vienna Convention. The United States Senate ratified the Vienna Convention and the Optional Protocol in 1969.

The United States has relied upon the compulsory jurisdiction of the ICJ to protect its own citizens overseas. In fact, the United States was the first country to invoke the Optional Protocol, which it used to bring an application against Iran concerning U.S. diplomatic and consular personnel who were held hostage in 1979. *United States Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1979

I.C.J. 7 (Dec. 15), 1980 I.C.J. 3 (May 24). In bringing that application, the United States relied on the Optional Protocol's establishment of the ICJ's compulsory jurisdiction over disputes arising out of the interpretation or application of the Vienna Convention. When the ICJ ruled in favor of the United States provisionally in 1979 and then finally in 1980, 1979 I.C.J. 7, 1980 I.C.J. 3, the United States insisted that Iran was bound to comply with the court's judgment.

On March 7, 2005, President Bush issued a letter through the Secretary of State to the UN Secretary General purporting to withdraw from the Optional Protocol.[7] *See* Letter from Condoleeza Rice, U.S. Sec'y of State, to Kofi Annan, United Nations Sec'y General. Even assuming that letter effected a withdrawal, the withdrawal does not obligate this Court to refrain from implementing the interpretations of Article 36 issued by the ICJ prior to the withdrawal.

A. The decisions of the ICJ issued prior to the withdrawal from the Optional Protocol continue to define the United States' obligations under the Vienna Convention.

When the United States signed the Optional Protocol, it promised to submit disputes over the meaning of Vienna Convention obligations to the ICJ and to treat the ICJ's rulings as binding. The United States then further submitted to the ICJ's jurisdiction by actively participating in the proceedings before the ICJ in *Avena*. *See* Pet. for Cert. at 6, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (describing the

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7. It is an open question whether the President can withdraw from a treaty without the consent of the Senate. *See Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (noting that there is no Constitutional provision that commits the authority to terminate treaties to the President) (Powell, J., concurring). Given that the Senate ratified the Optional Protocol, it is not clear whether Secretary Rice's letter has any legal effect. This question, however, is beyond the scope of this brief.

18-person United States team at the hearing before the ICJ in *Avena*, which was led by the Honorable William Howard Taft IV, Legal Advisor to the State Department, and which included lawyers from the Departments of State and Justice); *see also* Br. for Pet'r at 9, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (noting that the United States filed a 219-page Counter-Memorial and 2500-page Annex of written testimony and documentary evidence with the ICJ in *Avena*).[8] The United States must therefore be bound by the ICJ's interpretations of the Vienna Convention in *Avena* for as long as the United States continues to be a signatory to and so to be bound by the Vienna Convention.

Withdrawal by the United States from the ICJ's jurisdiction over future disputes does not affect its obligation to implement ICJ rulings, such as *LaGrand* and *Avena*, that were issued when the United States was subject to the ICJ's jurisdiction.[9] In *Avena*, the ICJ understood that it was issuing

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8. The substantial effort put forth to argue the merits in *LaGrand* and *Avena* differs starkly from the United States' actions in *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), in which the United States did not recognize the subject matter jurisdiction of the ICJ. In that case, the United States took measures to avoid ultimately being deemed subject to any ICJ judgment, including refusing to participate at all in the proceedings before the ICJ. If the United States wished to revoke the ICJ's authority to provide a binding interpretation of the Vienna Convention, then it could have attempted to avail itself of similar measures.

9. The United States has attempted to argue that the doctrine of nonmutual collateral estoppel will not apply to future Article 36 litigation between parties that were not part of the *Avena* proceedings. *See* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 47 (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). However, the primary reason for the narrow ruling in *Mendoza* limiting the *domestic* use of nonmutual collateral estoppel against the government was the barrier it would create to the development

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a binding interpretation of the Vienna Convention that would provide prospective guidance for the United States. As the ICJ explained:

> [T]he Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention . . . . In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Avena, ¶ 151. The United States, when it accepted the jurisdiction of the ICJ, committed to enforce "the nature or extent of the reparation to be made for the breach of an international obligation" specified by the ICJ. *Declaration by the President of the United States of America August 14, 1946 respecting recognition by the United States of America of the compulsory jurisdiction of the International Court of Justice*, 61 Stat. 128 (1946). The remedy issued in this case specifically includes a requirement that United States courts adapt their procedures to ensure that claims arising under the Vienna Convention be heard on the merits. Thus, regardless of whether the ICJ's jurisdiction over the United States' interpretation of the Vienna Convention may be limited in the future, that does not alter the United States'

(Cont'd)
of circuit splits for the Supreme Court to resolve. *Mendoza*, 464 U.S. at 160-61. That concern is not present here because the ICJ is a single tribunal—this feature has allowed the United States to carefully develop and argue its views in discrete cases before the ICJ. It would be tremendously wasteful not to accord comity or some estoppel value to ICJ decisions because, without these checks on litigation, the ICJ would have to issue an unending stream of nearly identical judgments on the interpretation of Article 36.

present and continuing obligation to implement the prospective reparation the ICJ specified in all cases where jurisdiction was proper.

Examples from American and international contexts confirm the principle that binding legal interpretations endure beyond a subsequent elimination of jurisdiction. In domestic courts, this question arises when a federal circuit court is divided so that certain states are no longer within the jurisdiction of the appellate court that previously governed them. *See, e.g.*, Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (creating the new Eleventh Circuit from States that were formerly part of the Fifth Circuit). When this occurs, the new circuit remains bound by precedents established by the former circuit before the new circuit was formed. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc). The rationale for this rule is straightforward—at the time the former circuit ruled, it had jurisdiction over the states in the new circuit. Other common law countries have applied similar reasoning when confronted with analogous questions. For example, when the Free Republic of Ireland ratified its constitution in 1922, the new legal apparatus had jurisdiction to create binding Irish law. However, Irish courts continued to be bound by pre-1922 decisions of the House of Lords because, at the time of those decisions, the House of Lords had jurisdiction over Ireland. *See Corway v. Independent Newspapers (Ireland) Limited*, [1999] 4 I.R. 484, ¶¶ 26-29 (explaining the operation of pre-1922 law in Ireland).

These principles apply to the withdrawal from the Optional Protocol—at the time the ICJ ruled on the interpretation of Article 36, the United States had submitted to the compulsory jurisdiction. Accordingly, the ICJ's ruling that the United States must accord "review and reconsideration" to those foreign nationals who were denied a hearing on their Article 36 claims continues to be a binding

interpretation of the United States' obligations under the Vienna Convention.

If the United States could eliminate any obligation to abide by the ICJ's interpretation of the Vienna Convention in *Avena* by withdrawing from the Optional Protocol, merely because the United States disagreed with the ICJ's ruling, treaty promises such as that the United States made when it signed the Optional Protocol would be meaningless. Allowing the United States to do so would severely undermine the rule of law internationally.

B. At a minimum, *Avena* Controls this case because the withdrawal from the Optional Protocol does not have retroactive effect.

Determining the precise operation of the ICJ rulings in the future, however, is not necessary to resolve the claims of criminal defendants like Mr. Bustillo. Even if the Court wishes to defer resolving the question of whether the ICJ's judgment in *Avena* is prospectively binding, the withdrawal from the Optional Protocol could not affect Mr. Bustillo's sentence because at the time of the failure to notify him of his Article 36 rights, the United States was a party to both the Vienna Convention and the Optional Protocol. It is an elementary legal principle that, if there is jurisdiction over a person or subject at the time of a transgression, a court has jurisdiction to resolve any disputes arising out of that transgression even if there is no longer jurisdiction over the person or subject. *See, e.g.*, Restatement (Second) of Conflicts of Laws § 35(2) (1971), comment d (explaining that if jurisdiction over a foreign corporation existed at the time of a transgression a subsequent withdrawal from the state by a corporation does not affect jurisdiction over the transgression). It follows from this principle that the presence of ICJ jurisdiction at the time of the violation is sufficient to give force to an ICJ judgment that bears on the failure to provide consular notification. *See* Vienna Convention on the

Law of Treaties, Article 70(1)(b) ("Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty . . . does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.");[10] *see also Society for the Propagation of Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. 464, 493 (1823) ("If [a right] be . . . secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right.").

Before any Virginia court denied the petitioner's state habeas petition, on June 27, 2001, the ICJ decided in *LaGrand* that procedural bars to Vienna Convention claims were not appropriate. *See LaGrand*, ¶ 125. The ICJ repeated this holding in *Avena* on March 31, 2004, before the Fairfax County Circuit Court or the Supreme Court of Virginia had entered final orders on the petitioner's state habeas petition. *See Avena*, ¶ 122. Thus, at the time the decision below was entered, there were two binding ICJ judgments that were in direct conflict with the Supreme Court of Virginia's decision.

The Virginia Supreme Court violated federal law and treaty obligations in its unpublished decision, which failed to even mention the authoritative interpretation of the Vienna Convention. To allow withdrawal from the Optional Protocol to retroactively excuse such disregard of the "supreme Law of Land," would undermine the stable and consistent application of the decisions of international tribunals. Given the striking similarity of petitioner's claim to the claims at issue in *Avena* and *LaGrand*, there is no way to distinguish petitioner's claim in a manner that would justify Virginia's

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10. The United States has signed, but not ratified, the Vienna Convention on the Law of Treaties. Nevertheless, federal courts have used this treaty as guide when there is no other legal authority to guide interpretation. *See, e.g., Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 n.5 (2d Cir. 2004); *United States v. Yousef*, 327 F.3d 56, 95 (2d Cir. 2003) (compiling examples).

use of a procedural bar. To excuse the Supreme Court of Virginia's refusal to adhere to the ICJ's authoritative interpretation on the basis of a later withdrawal of jurisdiction would erode our domestic and international commitment to the rule of law.

C. This Court has expressed a willingness to defer to the expertise of the ICJ.

This Court's per curiam opinion in *Breard v. Greene*, 523 U.S. 371 (1998), appropriately expressed a readiness to give comity to ICJ interpretations. In *Breard*, the Court rejected the argument that the Vienna Convention trumps the procedural default doctrine, an argument made by Petitioner Breard in a petition for an original writ of habeas corpus on the eve of his execution. *Id.* at 375. The Court expressed the view that, at that time, the procedural default doctrine was not inconsistent with the Vienna Convention. *Id.* The Court explained that it would have "give[n] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such" if there were such an interpretation. *Id.* But "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State." *Id.* The ICJ has since provided precisely such "a clear and express statement to the contrary." *Id.* at 371. *See Avena*, ¶ 113. This subsequent authoritative interpretation of the Convention by the ICJ eliminates the primary rationale upon which the *Breard* decision was based.

Accordingly, even if the withdrawal from the Optional Protocol effectively eliminates *compulsory* jurisdiction for the ICJ, this Court should extend comity to the ICJ's interpretations of Article 36 in *LaGrand* and *Avena*. The ICJ's sole function is the interpretation of treaties and other agreements between states. *See* Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055

(confining the jurisdiction of the court to matters included in the United Nations Charter or treaties, cases where states consent to jurisdiction to resolve disputes over interpretations of treaties, and other questions of international law). The careful and deliberative approach of the ICJ's fifteen judges, who decide only a handful of cases every year and draw upon their knowledge and experience as persons familiar with application of multilateral treaties in numerous fora, justifies deference to the ICJ's efforts to facilitate the uniform interpretation and implementation of treaties throughout signatory nations. *See* Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 497 (1995); *see also* Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 305 (2004) ("[t]he whole object of [a] treaty . . . is to establish a single, agreed-upon regime governing the actions of all the signatories. . . ."). Treating *LaGrand* and *Avena* as authoritative interpretations of the Vienna Convention would comport with this Court's previous practice of using ICJ judgments as definitive statements of the meaning of international agreements. *See United States v. Maine*, 475 U.S. 89, 99 (1986); *United States v. Louisiana*, 470 U.S. 93, 110 (1985) (citing *Fisheries* Case (U.K. v. Norway), 1951 I.C.J. 116 (Dec. 18), as an authoritative interpretation in a maritime boundary dispute).

III. State habeas provides an appropriate forum for giving effect to the ICJ's ruling that the use of procedural bars to dispose of consular notification claims violates the Vienna Convention.

Given the potential difficulties with federal habeas proceedings as a forum for "review and reconsideration" of Article 36 claims, state habeas proceedings provide a natural alternative for ensuring that the United States meets its treaty obligations. Indeed, the President has already recognized the unique suitability of state collateral proceedings to

implement the ICJ's interpretation of the Vienna Convention. *See* discussion *infra* pp. 26-27. This Court should, like the Executive Branch, determine that the vital international interests at stake in our implementation of Article 36 far outweigh the minimal burden created by a restriction on the use of procedural bar rules to dispose of consular notification defects. *See* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 41-43; *see also* discussion *infra* pp. 27-28.

A. The balance of interests underlying procedural default rules weighs against their application when treaty rights are at stake.

State procedural default rules are typically judge-made rules that endeavor to balance the need for administrative efficiency with the substantive rights of criminal defendants. Given the longstanding practices underlying the purpose of the procedural default doctrine, state and federal courts are often reticent to create exceptions on a case by case basis. However, when rights secured by the Vienna Convention bump up against procedural rules, the balance of policy interests is significantly different than it is when just the individual defendant's substantive rights are at stake. When a state arrests or prosecutes a citizen of a country that is a signatory to the Vienna Convention and fails to comply with the Convention's requirements, that failure violates not only the defendant's rights, but also the rights of the defendant's home country. *See, e.g., LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27) ("*LaGrand*") ¶ 74 ("[W]hen the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, . . . the sending State has been prevented for all practical purposes from exercising its rights under Article 36."); *Avena*, ¶ 102 (describing the United States as precluding Mexico "from exercising its right" under one provision of the Convention). Those rights include the

rights "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna Convention, art. 36 ¶ 1(c).

When a state fails to honor a treaty-partner's Vienna Convention rights, the federal government must deal with the consequences. The resulting tensions in international relations can be substantial. *See, e.g.*, Brian Knowlton, *Execution Pits Mexico Against U.S. – Fox Echoes World On Death Penalty*, INT'L HERALD TRIB., Aug. 16, 2002, at 1 (reporting that Mexican President Vicente Fox canceled a trip to visit President George W. Bush's Texas ranch to protest Texas's execution of a Mexican national who had not been told of his Vienna Convention rights). The inability of other nations to bring prosecutions before the ICJ as a result of the United States' withdrawal from the Optional Protocol will only exacerbate these tensions if domestic courts are unable to implement the remedies specified in the *LaGrand* and *Avena* judgments.

The impact on international relations distinguishes Vienna Convention rights from most other rights that have been subjected to procedural default rules. Generally, if an American defendant violates a state procedural rule in attempting to assert an individual right, only that individual's rights are affected. In such situations, this Court has determined that the need for judicial efficiency generally requires that any claim to that right be considered procedurally defaulted. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977). The balance of interests tips much more heavily toward the enforcement of the substantive right, however, when the right at issue belongs not just to the defendant, but also to his home country. Indeed, it would intrude on the federal government's constitutionally protected, exclusive, and paramount right to maintain international relations if individual states could freely enforce procedural default

doctrines in a manner that deprives a sovereign treaty-partner – which was never informed of the arrest and detention of one of its citizens – of commitments made to it by the United States. Indeed, in this case, Virginia would place the entire scope of a treaty-partner's sovereign rights in the hands of an individual attorney, who, through ignorance or mistake alone, could "waive" international obligations to those treaty partners.

The fact that the ICJ has issued the *Avena* Judgment also affects the policy considerations that necessarily bear on the question of whether some Vienna Convention claims should be exempt from the procedural default doctrines. The foreign relations stakes, and thus the national interest in the relationship between the Vienna Convention and the procedural default doctrines, are quite high. They are, in fact, dramatically higher now that the ICJ has issued the *Avena* Judgment, which requires reconsideration of otherwise defaulted Article 36 claims, than they were at the time this Court considered the effect of the Vienna Convention on federal procedural default rules in *Breard*. *See Breard*, 523 U.S. at 375 (noting the lack of any international court ruling at the time). The implications of such a decision for international relations are grave and are entirely different now than they were at the time *Breard* was before the Court.

B. State collateral proceedings are an appropriate forum for resolving the unique problems presented by consular notification defects.

Consular notification claims are ill-suited to direct review. In almost all cases on direct review, procedural rules confine the evidentiary record to information presented at the trial level. This feature of criminal proceedings imposes a barrier for the adequate and effective review of consular notification claims on direct appellate review. Documenting the occurrence and effect of consular notification is an intensive evidentiary task—counsel must: establish that

consular notification did not take place, obtain documentation from consular officials attesting to the assistance they could have provided, and develop evidence to demonstrate the effect of consular assistance. If this evidence is not in the trial record, appellate courts will be hesitant, and perhaps ill-equipped, to address consular notification claims effectively.

This Court has recognized that when claims are not suited to direct review, courts may not use procedural bars to resolve those claims on collateral review. In *Massaro v. United States*, 538 U.S. 500 (2003), this Court refused to allow the use of procedural bars for ineffective assistance claims on collateral review even if the criminal defendant could have brought the claim on direct review. The Court explained that it would be problematic to require criminal defendants to bring ineffective assistance claims on direct review because "evidence introduced at trial, . . . will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary [to determine whether counsel has been ineffective]." *Id.* at 505. In contrast, collateral proceedings provide a criminal with "a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created." *Id.* at 505-06 (quoting *United States v. Griffin*, 699 F.2d 1102, 1109 (11th Cir. 1983)).

Like ineffective assistance of counsel, the failure to provide the right to consular notification can taint criminal trials in ways that are not apparent from the trial record itself. For example, that record will not reflect the evidence that would have been obtained through factual investigation that the consulate has had no opportunity to conduct. As in this case, such evidence could include information about

witnesses or suspects who returned to the defendant's home country, information to which the consulate would have had ready access. The trial record will also likely fail to reflect any failure by the defendant to assist his attorney in his defense that may have resulted from the defendant's lack of understanding of the American justice system, a lack of understanding that the consulate could have helped ameliorate.

C. The President has determined that state collateral proceedings are well-suited for implementing the *Avena* Judgment.

The Executive Branch has itself recognized that state collateral proceedings are the appropriate forum to remedy consular notification defects. Indeed, the President has made the policy judgment that Texas courts should extend comity to the ICJ's decision in *Avena* by prohibiting the use of state procedural default rules to block Vienna Convention claims. *See* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 41-43 ("To the extent that state procedural default rules would prevent giving effect to the . . . *Avena* decision . . . those rules must give way."). *Id.* at 43. The President highlighted the unique "suitability of judicial review as a means of compliance" with the *Avena* decision. *Id.* at 41. Thus, there is no conflict between the conclusion that the Supremacy Clause compels state courts to lift their procedural bars to accommodate our federal obligations under the Vienna Convention and the President's desired means for implementing *Avena*.

That the President has attempted to limit state courts' implementation of *Avena* to the individual cases directly considered by the ICJ in *Avena* has no significance. While the President has "a degree of independent authority to act" in "foreign affairs," *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), this authority does not permit the Executive to pick and choose the relevant legal rules based

on the identity of a domestic criminal defendant. *Contrast* Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 48-49 (expressing the desire to retain Executive prerogative over which criminal defendants will benefit from the *Avena* Judgment). The application of law in an individual case is at the heart of the judicial power. To allow the President to exercise this authority (or to allow the Executive to employ the legislative power to determine the jurisdiction of the courts), would violate the first principles of separation of powers. As this Court explained in *United States v. Nixon*:

> [The] judicial Power . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

418 U.S. 683, 704 (1974).

D. Easing restrictions on the use of procedural bars in collateral proceedings would not place a significant burden on state courts.

Providing the circumscribed relief from state procedural bar rules required under the Vienna Convention would not open the floodgates to Article 36 claims on state habeas for at least two reasons. First, the existence of limited relief for foreign nationals detained in violation of the Vienna Convention would, at long last, provide an incentive for law enforcement officials to develop systematic methods to inform detainees of their right to consular notification. The development of a standardized means to convey the required information to detainees would prevent Article 36 violations from occurring in the first instance. A state's effective elimination of Article 36 violations would be an appropriate prophylactic means of avoiding federal limits on its procedural bar rules.

Second, as the ICJ directed in *Avena*, criminal defendants who receive relief from procedural bar rules on review and reconsideration will have to demonstrate that "the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice." *Avena*, ¶ 121. This Court has also suggested that to obtain relief from the failure to supply consular notification a criminal defendant would have to show that the "[Article 36] violation had an effect on the trial." *Breard*, 523 U.S. at 377 (citing *Arizona v. Fulminante*, 499 U.S. 279 (1991)). Indeed, this Court based its refusal to provide relief to Mr. Breard, in part, on the grounds that "no . . . showing [of prejudice] could even arguably be made." *Id.*

Not all foreign detainees will be able to demonstrate at the state habeas phase that an Article 36 violation prejudiced their trial. In these cases, the burden placed on state courts will be minimal because it will not be necessary to order a new trial or a new sentencing hearing. The sole restriction the Vienna Convention places on state courts is that they may not "interpose procedural default to prevent review and reconsideration." Br. for the United States as *amicus curiae* in *Medellin v. Dretke* at 48. Accordingly, any concerns that a limited restriction on the use of procedural bar rules in state collateral proceedings would pose anything beyond a minimal obligation are misplaced.

Nevertheless, there are criminal defendants, like Mr. Bustillo, who can demonstrate that the failure of law enforcement authorities to provide the notification required by the Vienna Convention made a material difference to the outcome of their trial. As this Court has long held, the ability of the treaty power to alter the operation of state law in state courts goes beyond the ability of federal legislation to do so. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("It is obvious that there may be matters of the sharpest exigency

for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could. . . ."). Accordingly, in cases where criminal defendants have a right under the ICJ's binding interpretation of Article 36 to review and reconsideration of their sentences, the ABA respectfully submits that states may not use procedural bars to evade our federal obligation to provide relief.

CONCLUSION

For the reasons set forth above the ABA respectfully submits that the Court should reverse the judgment of the Supreme Court of Virginia.

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In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS, PETITIONER,
v.
STATE OF OREGON

MARIO A. BUSTILLO, PETITIONER,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS

On Writs of Certiorari to the Supreme Courts of Oregon and Virginia

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law. ABCNY educates the bar and the public about various legal issues, including international law and criminal procedure. ABCNY is concerned that the United States has not been honoring its obligations under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("Vienna Convention" or "Convention"), to inform foreign nationals arrested in the United States of their rights to consular notification and access. This failure prevents foreign nationals from enjoying the full protections that our legal system provides to guarantee fair criminal trials. It also discourages other nations from respecting the consular notification rights of U.S. nationals arrested abroad – rights that may be critical to their fair treatment by foreign criminal justice systems. ABCNY believes that this Court must hold that the Vienna Convention confers enforceable rights – both because the Convention's text confers those rights in unmistakable terms, and in order to ensure that foreign nationals in the United States and U.S. nationals abroad receive the consular notification and access guaranteed by the Convention and critical to fair criminal procedures.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases are about ensuring a fair criminal process both for foreign nationals arrested in the United States and for U.S. nationals arrested abroad. Almost 40 years ago, the United States ratified the Vienna Convention, a multilateral treaty to which 168 nations are now parties. The Convention recognizes

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[1] Letters from petitioners and respondents indicating consent to file this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

that individuals arrested in foreign countries face alien and unfamiliar criminal justice systems. Those individuals will therefore frequently lack both the understanding and the resources needed to avail themselves of the protections foreign systems provide to ensure the fairness of their criminal procedures. The Convention addresses that problem by guaranteeing that individuals arrested in foreign countries have access to consular officials from their home countries. Those consular officials provide a cultural bridge between the foreign nationals and the criminal justice systems of the arresting countries – educating the nationals about the legal systems, making sure they have adequate representation, helping them to communicate in the language of the arresting countries, and assisting them to obtain evidence or witnesses located in their home countries. Consular assistance thus places foreign nationals – whether foreigners in the United States or U.S. nationals in a foreign country – on equal footing with other criminal defendants. It enables *all* defendants, regardless of nationality, to obtain the fairest possible resolution of the charges against them.

To ensure that consular assistance is available, Article 36 of the Convention provides that foreign nationals "shall have" the "freedom" to "communicat[e] with" and have "access to their consular officers." Vienna Convention, art. 36(1)(a). Article 36 further provides that, if a foreign national is arrested, the competent authorities of the arresting nation "shall, without delay, inform" the appropriate consular officials of the arrest if the national "so requests." *Id.*, art. 36(1)(b). Article 36 also requires that "[a]ny communication addressed to the consular post by the person arrested . . . shall also be forwarded . . . without delay." *Id.* And it mandates that the arresting authorities "shall inform" the foreign national "without delay of his rights" under the Convention. *Id.*

These provisions give foreign nationals individual rights enforceable in the courts of the United States (or other arresting nations). This Court has long recognized that treaties can give rise to individual rights, and, under the Court's treaty in-

terpretation jurisprudence, Article 36 is not a close case. Its text clearly establishes individual rights: it uses mandatory language, links state consular notification obligations to the will of individual foreign detainees, and expressly describes its provisions as "rights" and "freedom[s]" belonging to foreign nationals. Given the clarity of the text, the Court need not look any further. In any event, other interpretive guides reinforce the conclusion that Article 36 creates individual rights: The Convention's negotiation history reveals that the delegates, in agreeing upon the final version of Article 36, were fully aware that it confers individual rights. The Executive Branch's contemporaneous understanding of the Convention was in accord. And the bulk of the international community agrees.

The conclusion that Article 36 confers individual rights is not simply compelled by its text. That conclusion is also essential as a practical matter. Consular officials play a crucial role in ensuring that foreign nationals understand and are able to invoke the rights guaranteed to criminal defendants in the United States. The importance of consular assistance to foreign defendants is not mere speculation: Examples from case law vividly illustrate that consular involvement – or its absence – has a decisive impact on whether foreign nationals are able to invoke the procedural protections to which all defendants are entitled and which are essential to a fair trial.

Despite its fundamental importance, consular notification rarely occurs in the United States. For example, recent studies indicate that less than *five percent* of foreign defendants on death row received timely notification of their consular rights. Courts have long recognized that judicial enforcement is a powerful tool for giving legal rights practical force. Recognizing that the Convention creates enforceable rights thus will not only give effect to the treaty's clear language but will also improve this country's disappointing record of compliance.

The benefits of such an improvement would extend far beyond foreign defendants in the United States. Every year, thousands of Americans are arrested abroad. U.S. consular of-

ficials provide those Americans with a broad range of assistance – explaining foreign legal and judicial procedures, monitoring conditions of confinement, and, if necessary, intervening to forestall physical abuse and obtain medical attention. Consular assistance can make the difference between fair treatment and capricious punishment (or worse) for Americans arrested abroad. But, as the State Department itself has recognized, foreign nations are unlikely to comply with their consular notification obligations to U.S. nationals if the United States does not comply with its obligations to foreign nationals. Mutuality and reciprocity are foundational principles of international law. Although U.S. compliance with its consular notification obligations cannot *guarantee* that Americans will be able to secure consular assistance abroad, U.S. compliance with the Convention will strongly encourage other nations to comply as well. Protecting American interests abroad thus supplies an additional strong reason for this Court to endorse the individual rights that are plainly contained in the Convention's text.

ARGUMENT

THE VIENNA CONVENTION CREATES JUDICIALLY ENFORCEABLE RIGHTS

The initial question in these cases – indeed, in any case in which a criminal defendant raises a claim or defense under the Vienna Convention – is whether the Convention creates judicially enforceable rights. The importance of that question transcends situations where a defendant seeks a suppression remedy or habeas relief. Indeed, this Court's answer to the question will determine whether a defendant can ever obtain relief for a violation of the Convention.[2]

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[2] This brief addresses only that initial question. *Amicus curiae* anticipates that the parties and other *amici* will fully address the other questions presented, including whether suppression is an available remedy for violations of the Convention and whether consideration of claims under the Convention can be precluded by procedural bar rules where the arresting state failed to comply with the Convention's notification requirements.

As four members of this Court have recognized, if the Convention does not create enforceable individual rights, a foreign detainee can "*never* complain in court – even in the course of a trial or on direct review – about a state's failure to" inform the detainee of his consular notification rights. *Medellin v. Dretke*, 125 S. Ct. 2088, 2102-03 (2005) (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting from dismissal of writ of certiorari as improvidently granted).[3] This Court should not – and need not – countenance that unjust result. As explained below, the text of the Convention vests foreign detainees with individual rights to consular notification and access. And recognizing those rights is essential to ensure that both foreigners arrested in the United States and Americans detained abroad receive fair criminal process.

A. Article 36 Of The Convention Creates Enforceable Individual Rights to Consular Notification And Access

Whether the Vienna Convention creates enforceable rights turns on two questions: First, is the Convention "self-executing," *i.e.*, enforceable by the courts without the need for implementing legislation? And, second, does it create individual rights? There is no serious dispute about the answer to the first question: The Convention is self-executing.[4] It therefore

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[3] The remainder of the Court did not address whether the Convention creates individual rights but instead dismissed the writ as improvidently granted in light of a successive state habeas petition, filed days before oral argument, which presented the petitioner's claims in a less complicated procedural posture. *See Medellin*, 125 S. Ct. at 2089-92 (per curiam).

[4] The State Department adopted that position when Congress was considering ratification of the Convention. S. Exec. Doc. No. 91-9, app. at 5 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). The United States has adhered to that position in its filings in this Court. Brief for the United States as *Amicus Curiae* at 26, *Medellin*, 125 S. Ct. 2088 (2005). The four members of the Court who addressed the question whether the Convention is self-executing reached the same conclusion in *Medellin*. 125 S. Ct. at 2103 (O'Connor, J., joined by Stevens, Souter, and Breyer, JJ., dissenting from dismissal of writ of certiorari as improvidently

has the "force and effect" of law, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), and "a court must enforce it on behalf of an individual" to whom it accords rights, *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992); *see Foster v. Neilson*, 27 U.S. (2 Peters) 253, 314 (1829); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Consequently, the critical question for this Court is whether the Convention creates individual rights. The answer is clearly yes.

1. Treaties can create enforceable individual rights

This Court long ago recognized that treaties can create individual rights. Although a treaty is primarily an agreement among nations, it "may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *The Head Money Cases*, 112 U.S. 580, 598 (1884).

Consistent with that principle, this Court has, over the course of two centuries, repeatedly permitted individual foreign nationals to assert rights arising from treaties. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dallas) 199, 239 (1796) (enforcing a British citizen's right to collect a debt under a peace treaty providing that "creditors, on either side, shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts"); *Heong v. United States*, 112 U.S. 536, 542 (1884) (recognizing an individual right to reenter the United States under a treaty providing that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord"); *United States v. Rauscher*, 119 U.S. 407, 410, 418-19, 430 (1886) (concluding that an extradition treaty between the United States and Great Britain created an individual right to be tried only for the offense

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granted). And that view is generally shared by the lower courts. *See Jogi v. Voges*, 425 F.3d 367, 377-78 (7th Cir. 2005) (citing cases).

forming the basis of the extradition); *Asakura v. City of Seattle*, 265 U.S. 332, 339-40 (1924) (recognizing a Japanese citizen's right to engage in pawn brokering on the same terms as U.S. citizens under a treaty guaranteeing Japanese the "liberty to . . . carry on trade . . . upon the same terms as native citizens or subjects"); *Clark v. Allen*, 331 U.S. 503, 507 (1947) (recognizing the right of a German national to sell inherited property under a treaty providing that "such national shall be allowed a term of three years in which to sell the same").

In line with those holdings, the Ninth Circuit has concluded that the Vienna Convention itself (in provisions not at issue here) confers individual rights on foreign consular officials. *See Risk v. Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991). The United States agrees. *See* Brief for United States as *Amicus Curiae* at 26 n.7, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005). Thus, there can be no question that treaties, including the Vienna Convention, may create individual rights.

2. *Determining whether Article 36 of the Vienna Convention creates individual rights requires an analysis akin to statutory interpretation*

To decide whether Article 36 of the Convention creates individual rights, this Court engages in an analysis similar to statutory interpretation. For a statute, the goal is to ascertain the intent of Congress; for a treaty, the goal is to ascertain the intent of the parties. *See United States v. Stuart*, 489 U.S. 353, 366 (1989); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). As with statutes, a treaty's text is by far the most important consideration in determining its meaning. *See Alvarez-Machain*, 504 U.S. at 663; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699-700 (1988); *Maximov v. United States*, 373 U.S. 49, 52-54 (1963).

If the treaty's text is "difficult or ambiguous," courts may look – as when interpreting statutes – to extrinsic materials to assist in ascertaining the parties' intent. *Volkswagenwerk*, 486

U.S. at 700. These materials include the negotiation and ratification history of the treaty (which is analogous to the legislative history of a statute). *Id.* Courts may also look – again as with statutory interpretation – to the views of the Executive Branch. *See Sumitomo*, 457 U.S. at 184-85. But those views are "not conclusive," *id.* at 184, and they are due respect only if they are "reasonable," *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999). Indeed, this Court has not hesitated to reject the Executive's interpretation of a treaty when that view was contrary to the treaty's text or to the Executive's previous interpretation. *E.g.*, *Chan*, 490 U.S. at 134; *id.* at 136 (Brennan, J., concurring in the judgment); *Perkins v. Elg*, 307 U.S. 325, 328, 337-49 (1939); *Johnson v. Browne*, 205 U.S. 309, 318-21 (1907).

Courts may also consult extrinsic materials, unique to treaties, that reflect their international nature. Those materials include the views of the international community, as reflected by the construction adopted by other treaty parties and the interpretation given by international bodies. *See Stuart*, 489 U.S. at 369; *Breard v. Greene*, 523 U.S. 371, 374 (1998).

A final interpretive guide unique to treaties is the principle of liberal construction. Under that principle, "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940). The principle of liberal construction reflects the nature of the international context in which treaties are concluded. *See Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933). And this Court has adhered to that principle consistently over two centuries. *See Stuart*, 489 U.S. at 368; *Kolovrat v. Oregon*, 366 U.S. 187, 193 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 127, 129 (1928); *Hauenstein v. Lynham*, 100 U.S. (10 Otto) 483, 487 (1880); *Shanks v. Dupont*, 28 U.S. (3 Peters) 242, 249 (1830).

None of the extra-textual sources that courts may use to clarify an ambiguous treaty is determinative; each is simply one factor among many that bear consideration. *See Air France v. Saks*, 470 U.S. 392, 400-05 (1985); *Stuart*, 489 U.S. at 366-70. Even more important, as with statutory interpretation, extra-textual considerations cannot trump the plain meaning of a treaty's text. Thus, "where the text is clear," the Court "ha[s] no power" to adopt a contrary interpretation. *Chan*, 490 U.S. at 134. *See also Maximov*, 373 U.S. at 52-54 (rejecting interpretation based on treaty's "objective" because the proffered interpretation was inconsistent with the treaty's "plain language"); *Ware*, 3 U.S. at 239 (Chase, J.) ("If the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation.").

3. Article 36 creates individual rights to consular notification and access

Under these established interpretative principles, Article 36 of the Vienna Convention plainly creates individual rights. The text of Article 36 is unambiguous, and resort to other sources of interpretation is therefore unnecessary. Nonetheless, the relevant extra-textual sources confirm the clear import of the treaty language.

Article 36(1)(a) provides that "[n]ationals of [a] sending State shall have the . . . freedom" to communicate with and have access to "consular officers of the sending State." Vienna Convention, art. 36(1)(a).[5] Article 36(1)(b) mandates that, when the national of a sending State is arrested or detained, "if [the national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State." *Id.*, art. 36(1)(b). That subparagraph further commands that "[a]ny communication addressed to the

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[5] As relevant here, the term "sending State" refers to the foreign national's home country. The term "receiving State" refers to the country in which the foreign national is arrested or detained.

consular post by the person arrested, in prison, custody, or detention shall also be forwarded by the said authorities without delay." *Id.* Article 36(1)(b) also instructs that the arresting "authorities shall inform the person concerned without delay of his rights under this sub-paragraph." *Id.* Article 36(2) makes clear that the "rights referred to" in Article 36(1) "shall be exercised in conformity with the laws and regulations of the [arresting] State," but those "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under [the] Article are intended." *Id.*, art. 36(2).

Thus, the text of Article 36 confers individual rights with unmistakable clarity. It speaks in manifestly mandatory terms: Nationals of the sending State "*shall* have the . . . freedom" to communicate with and have access to their consulate. *Id.*, art. 36(1)(a) (emphasis added). The receiving State "*shall*" inform the sending State's consular post of a foreign national's arrest "if [that national] so requests." *Id.*, art. 36(1)(b) (emphasis added). The receiving State "*shall*" transmit any communications the foreign detainee wishes to send to his consulate. *Id.* (emphasis added). And the receiving State "*shall*" inform the detained foreign national of "his rights" under the Convention. *Id.* (emphasis added).

Even more significant, Article 36 does not simply impose obligations on *states* but links those obligations to *individuals*: Article 36(1)(a) specifies that "[n]ationals of a sending State" shall have the specified freedoms. *Id.*, art. 36(1)(a). The first clause of Article 36(1)(b) gives control over consular notification to the *foreign detainee* by providing that the sending State shall be notified *only* if "he so requests." *Id.*, art. 36(1)(b). And the last clause of Article 36(1)(b) specifies that "the person concerned" (*i.e.*, the foreign detainee) possesses the rights to have his consulate notified and his communications delivered. *Id.*

Finally, Article 36 repeatedly describes its provisions as creating "rights" or "freedom[s]." Article 36(1)(a) describes

the foreign national's entitlement to consular communication and access as a "freedom." *Id.*, art. 36(1)(a). Article 36(1)(b) refers to the foreign detainee's power to have his consulate notified and his communications delivered as his "rights." *Id.*, art. 36(1)(b). And Article 36(2) twice refers to the "rights" accorded by the Article. *Id.*, art. 36(2).

This Court has consistently interpreted treaties employing similar language to confer individual rights. For example, the treaties held to create individual rights in *Ware v. Hylton* and *Clark v. Allen* also used mandatory language to accord benefits to individuals. *See Ware*, 3 U.S. at 239 (treaty provided that "*creditors*, on either side, *shall* meet with no lawful impediment") (emphasis added); *Clark*, 331 U.S. at 507 (treaty stated that "*such national shall* be allowed a term of three years in which to sell" inherited property) (emphasis added). And the treaties held to create individual rights in *Heong v. United States* and *Asakura v. City of Seattle* not only used mandatory language to confer benefits on individuals but, like Article 36, also referred to "rights" or "liberties." *See Heong*, 112 U.S. at 571 (treaty provided that "*Chinese laborers . . . shall* be allowed to go and come of their own free will and accord, and shall be accorded all the *rights* . . . accorded the citizens and subjects of the most favored nation") (emphasis added); *Asakura*, 265 U.S. at 340 (treaty stated that "*citizens* or *subjects* of each of the High Contracting Parties *shall* have *liberty* . . . to carry on trade . . . upon the same terms as native citizens and subjects") (emphasis added) (quotation omitted).

Indeed, even if Article 36 were a *statutory* provision, it would clearly create individual rights. In determining whether a statute creates an individual right, the Court considers whether it uses "explicit right- or duty-creating language," *Gonzaga University v. Doe*, 536 U.S. 273, 284 n.3 (2002) (quotation omitted), whether it employs mandatory language, *see id.*, and whether it is "phrased in terms of the persons benefited," *Cannon v. University of Chicago*, 441 U.S. 677,

692 n.13 (1979). As described above, Article 36 meets all three of those criteria. This Court has concluded that statutes create individual rights, even when they do *not* describe the entitlements that they create as "rights," provided that they use mandatory language directed at a benefited class. *See Gonzaga*, 536 U.S. at 284 n.3 (noting that Title VI and Title IX both create individual rights and highlighting their use of the phrase "*[n]o person* in the United States *shall*") (quotation omitted). Here, Article 36 not only uses mandatory language directed toward a specific benefited class but also explicitly employs the term "rights." It is thus virtually certain that, if Article 36 were a statute, this Court would hold that it creates individual rights. *See Medellin*, 125 S. Ct. at 2104 (O'Connor, J., dissenting).

Since Article 36 would create individual rights if it were a statute, there can be no doubt that it does so as a treaty. This Court has long taken a liberal approach to the interpretation of treaties. *See supra* p. 8. As Justice Story put it almost two hundred years ago in *Shanks*: "If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?" 28 U.S. at 249. Under that approach, the Court has enforced individual rights in treaties that would likely not have been held to confer rights under the analysis used for statutes. *See, e.g.*, *Rauscher*, 119 U.S. at 410-11 (enforcing individual right under treaty that did not purport to confer benefit on individuals). Where, as here, a treaty satisfies the standards for creating individual rights by statute, there is even more reason to recognize an individual right under the treaty.

Because the text of Article 36 is clear, there is no reason to consult other sources, such as the prefatory language to the Convention or to Article 36 itself. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290-91 (2000); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 n.13 (1982). In

any event, those sources do not require a different result. Although the Convention's preamble disclaims an intent to "benefit individuals," in context, that disclaimer refers to the lack of intent to benefit individual *consular officials*, not to an intent to restrict the rights of foreign nationals. *See Jogi v. Voges*, 425 F.3d 367, 381 (7th Cir. 2005); Report of the U.S. Delegation to the United Nations Conference on Consular Relations, *reprinted in* Vienna Convention on Consular Relations, S. Exec. Doc. No. 98-118, at 46 (May 8, 1969).

The prefatory language introducing Article 36 is also fully consistent with the conclusion that the Article confers individual rights. That language indicates that the provisions of Article 36 are intended to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Vienna Convention, art. 36, preface. But that purpose is fully consistent with an individual right to consular notification and access. By placing the decision to notify the consulate in the hands of the detained foreign national, Article 36 simultaneously assists consular officials in performing their functions and protects the individual rights of the detained foreign nationals to choose whether they want assistance. *See* S. Exec. Doc. No. 98-118, at 60.

The drafting debates on the Convention likewise indicate that Article 36 is concerned with individual rights as well as facilitating the consular function. The original draft of Article 36(1)(b) required consular notification of arrest or detention in every case, regardless of the desires of the detainee. *See* S. Exec. Doc. No. 98-118, at 59. When the delegates amended the Article – by tying consular notification to a detainee's request and requiring receiving States to notify detainees of their rights to consular notification and communication – the delegates explicitly recognized that they were changing the Convention "to 'protect the rights of the national concerned.'" Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations*, 18 Mich. J. Int'l L. 565, 597 n.200 (1997)

(quoting United States delegate); *see id.* at 597-98; S. Exec. Doc. No. 98-118, at 59-60. Similarly, when one delegation proposed amending Article 36(1)(a) to eliminate its reference to foreign nationals' freedom to communicate with their consulates, other delegates recognized that this was an attempt to eliminate an individual "right" to consular communication from the Convention. *See* Kadish, 18 Mich. J. Int'l L. at 596-97. The amendment was withdrawn in the face of strong opposition, and Article 36(1)(a) retained language recognizing this freedom of communication. *Id.*

Consistent with this negotiation history, the Letter of Submittal from the Secretary of State to the President and the Report of the United States Delegation both indicated that the Convention recognized individual "right[s]." *See* S. Exec. Doc. No. 98-118, at vi, 60. Those documents make clear that the Executive Branch's contemporaneous interpretation of the Convention was that it created individual rights. That original interpretation of the Convention is still reflected in the numerous references to individual rights contained in the State Department's booklet on Consular Notification and Access, *see* U.S. Department of State, Consular Notification and Access at 3, 14, 15, 18, 19, 20, *available at* http://travel.state.gov/pdf/CNA_book.pdf, and its Foreign Affairs Manual ("FAM"), *see* 7 FAM § 421.1-1 (Sept. 3, 2004), *available at* http://foia.state.gov/regs/fams.asp?level=2&id=8&fam=0.[6] The cur-

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[6] The statement in a 1970 letter that the State Department did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States," *United States v. Li*, 206 F.3d 56, 64 (1st Cir. 2000), is not to the contrary. That statement does not address whether the Convention creates individual rights. And the statement cannot mean that the Convention would not require the states to do *anything* new. Regardless of whether the Convention creates enforceable rights, it indisputably requires arresting authorities to inform foreign nationals that they are entitled to notify and communicate with their consulates. Consistent with that requirement, the State Department's Consular Notification and Access booklet explicitly instructs state

rent Executive Branch view that the Convention does not create individual rights is due little weight, because it is inconsistent with both the plain text of the Convention and the contemporaneous interpretation of U.S. negotiators and other diplomats. *See supra* p. 8.

Other extra-textual interpretive guides also confirm that Article 36 creates individual rights. Most notably, the International Court of Justice ("ICJ") has so held. *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466, 492-94 (June 27). In all cases involving the Convention, this Court owes "respectful consideration" to the ICJ's interpretation because the ICJ is "an international court with jurisdiction to interpret" that treaty. *Breard*, 523 U.S. at 375. But the ICJ's interpretation is entitled to even greater weight in these cases. The Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 326, gives the ICJ "compulsory jurisdiction" over disputes between parties to the Protocol arising out of the interpretation of the Convention. The United States was a party to the Protocol both when the ICJ held, in the *LaGrand Case*, that Article 36 creates individual rights and when the arrests in these cases were made. The ICJ's interpretation is therefore binding on the United States here. *See* 21 U.S.T. 326; *see also, e.g.*, Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Bustillo v. Johnson*, No. 05-51. Moreover, there are currently 45 parties to the Protocol, and each of those 45 parties is bound to follow the ICJ's interpretation. Thus, even if the United States were not formally bound by the ICJ's interpretation, that interpretation would still be entitled to significant weight as evidence of how other treaty parties interpret the Convention. *See supra* p. 8.

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and local law enforcement personnel that they must tell foreign detainees of their right to consular access, and it provides suggested statements for complying with that obligation, *id.* at 74-75 (dissenting opinion).

In sum, the plain language of the Convention, and the weight of the extra-textual interpretive sources, both make clear that Article 36 confers individual rights. As the remainder of this brief explains, it is essential that the Court give effect to the command of the Convention's text. Recognizing that the Convention confers enforceable rights is critical to ensuring that the United States adheres to the Convention's requirements. That adherence, in turn, is vital to guaranteeing that foreign nationals arrested in the United States and U.S. nationals arrested abroad are able to avail themselves fully of the panoply of protections that assures a fair criminal process.

B. Enforceable Rights To Consular Notification And Access Are Essential For Foreign Nationals To Receive The Basic Protections That Guarantee A Fair Criminal Process

Although respondents contest that the Convention creates enforceable rights, no one disputes that it obligates the United States to inform foreign detainees that they are entitled to notify their consulates of their arrests and to communicate with consular officials. In practice, however, the United States hardly ever complies with that undisputed obligation. The overwhelming majority of foreign nationals arrested in the United States are not informed of their rights to consular notification and access. As a result, those nationals are often unable to avail themselves of basic protections designed to ensure fair criminal procedures – including the right to counsel, *Miranda* protections, and the right to exculpatory evidence.

It is thus vital that the notification of consular rights required by the Convention actually take place – both to vindicate the Nation's international obligations and to preserve its commitment to due process of law. And a powerful way for this Court to ensure adherence to the Convention's requirements is to honor the Convention's provisions creating an individual, judicially enforceable right to consular notification.

1. Whether foreign nationals are notified of their rights to consular assistance often determines whether they obtain the fundamental rights guaranteed to criminal defendants

Many foreign nationals lack a basic understanding of the American legal system. In addition, their ability to communicate in English is often limited. As a result, foreign detainees will frequently not completely comprehend the charges against them or their fundamental legal rights. Kadish, 18 Mich. J. Int'l L. at 605. Consular officials play a critical role in remedying that problem. "The consulate ensures that a detained national fully understands the nature of the charge against [him], as well as [his] legal rights and options." Anne James, *The International Justice Project, Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA* at 21 (hereinafter "James"). In essence, the consulate serves as a "cultural bridge" between the foreign defendant and the local legal system. *Id.* And that cultural bridge is often crucial to place the arrested foreign national "on par with a non-foreigner." Kadish, 18 Mich. J. Int'l L. at 606.

Consular officials provide an array of assistance to ensure that detained foreign nationals obtain the procedural protections to which criminal defendants are entitled under U.S. law. The following list illustrates the types of assistance provided:

- ***Consular officials ensure that foreign nationals are informed of their rights in a language that they understand.***

Most frequently, that information includes an explanation of the right to an attorney, as well as the right not to speak to the police in the absence of an attorney. It may also include, for example, reassurance that the detainees will not suffer adverse consequences if they choose not to talk, and notice that they can have a court-certified interpreter present at legal proceedings. *See, e.g.*, *Cardenas v. Dretke*, 405 F.3d 244, 251-52 (5th Cir. 2005) (Mexican consulate would have explained to defendant the significance of rights to counsel and to remain silent); *United States v. Ortiz*, 315 F.3d 873, 884 (8th Cir.

2002) (former Consul General for Colombia in Chicago testified that, had he been in contact with defendants, he would have advised them of their right to an attorney); *State v. Buenaventura*, 660 N.W.2d 38, 46 (Iowa 2003) (parties stipulated that, "had the Philippine consulate been notified of [defendant]'s detention, it would have advised him to talk to an attorney before giving a statement"); *State v. Navarro*, 659 N.W.2d 487, 488 (Wis. Ct. App. 2003) (Mexican consular employee stated that, had he been given the opportunity to speak with the defendant, "he would have advised him not to make or sign any statements whatsoever until the assistance of legal counsel had been obtained"); *State v. Martinez-Rodriguez*, 33 P.3d 267, 276 (N.M. 2001) (Mexican consul submitted affidavit stating that he would have "advised [defendants] not to speak with anyone, and that they in fact would not suffer any adverse consequence if they chose not to give statements . . . , that they can also have a court certified interpreter to be present at any stage of the proceedings, and also about the right to request assistance of legal counsel").

The majority of American citizens are very familiar with the right to counsel and the right against self-incrimination, which provide the foundation for a fair criminal trial. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Strickland v. Washington*, 466 U.S. 668, 684 (1984). But those rights may be "meaningless or insignificant to many foreign detainees," who may be unaccustomed to our adversarial system of justice or come from countries where remaining silent under questioning can be used against them in court. James at 21. Therefore, without consular assistance to explain the significance of those rights, foreign nationals may waive them unwittingly. *Id.* at 21-23.

- ***Consular officials provide foreign nationals with information about lawyers who can represent them.***

Consular officials routinely "contact the arrested person and undertake to determine whether the attorney on the case is

adequately qualified or whether a more qualified attorney is required to properly defend the arrested individual." *Cauthern v. State*, 145 S.W.3d 571, 591 (Tenn. Crim. App. 2004) (testimony of German Deputy Consul General); *see, e.g., United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999) (Mexican consul stated that, had defendants contacted him, he would have "assist[ed] them in obtaining competent legal representation").

This assistance may involve placing foreign nationals in contact with lawyers who speak their language and understand their cultural background. James at 31. Or it may entail assuring that a foreign detainee's lawyer has the appropriate kind of experience, such as experience with death penalty cases. *Id.*; *see, e.g., Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting habeas corpus relief to Mexican national because his "trial counsel's inexperience in capital litigation caused him to believe" that funds were not available "to properly investigate [the national's] childhood, social history or other aspects of his life," and noting that, if the defendant had obtained consular assistance, "the Government of Mexico would have intervened in the case, assisted with [the national's] defense, and provided resources to ensure that he received a fair trial and sentencing hearing"); Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul Gen. for the Rep. of Poland in Chicago at 43-44, *People v. Madej*, 478 N.E. 2d 392 (Ill. 1985) (Polish consulate would have helped death-eligible defendant obtain an attorney with death-penalty experience). *See generally Strickland*, 466 U.S. at 685-86 (recognizing the "crucial role" of counsel, particularly at capital sentencing).

- ***Consular officials help foreign nationals obtain evidence and witnesses located in their home countries.***

Even where a foreign national understands the U.S. legal system and has access to a competent attorney, the foreigner may still be handicapped in presenting his case. "Crucial evi-

dence favourable to the defence may exist only in the defendant's home country but may lie beyond the reach of defence counsel. The gathering of important documents may require the consulate to correspond with other branches of the home government, or may rely on the notarizing function of the consulate for their legal verification." James at 21.

In death penalty cases, for example, the defendant's background and life experiences are often central to the case in mitigation. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-25, 534-35 (2003). In such cases, "the gathering of mitigation evidence and locating mitigating witnesses" in the foreign national's home country are "[a]mong consular officials most important duties." *Torres v. State*, 120 P.3d 1184, 1188 (Okla. Crim. App. 2005); *see, e.g.*, *LaGrand Case*, 2001 I.C.J. at 491 (noting that German consular officials would have assisted counsel in developing mitigating evidence from the defendants' childhood). Evidence from a foreign national's home country may also be important to the defense in non-capital cases. *See, e.g.*, *United States v. Emuegbunam*, 268 F.3d 377, 387-88 (6th Cir. 2001) (Nigerian consulate stated that delay in notification prevented it from bringing witnesses to the United States in time for trial, and the district court concluded that the inability to call the witnesses could prejudice the defendant).

As these examples suggest, consular involvement can have a significant impact on whether arrested foreign nationals are able to avail themselves of their rights under U.S. law. For instance, after Mexican national Ricardo Aldape Guerra received the death penalty in Texas state court, the Mexican consulate helped him secure pro bono representation from a large law firm. Michael Fleishman, *Reciprocity Unmasked: The Role of the Mexican Government in Defense of its Foreign Nationals in United States Death Penalty Cases*, 20 Ariz. J. Int'l & Comp. L. 359, 371 (2003). The consulate also assisted Guerra in uncovering significant evidence that had not been presented at his trial. *Id.* Utilizing the newly discovered evi-

dence, the firm filed a habeas corpus petition that alleged a variety of prosecutorial misconduct, including pretrial intimidation of witnesses, use of false evidence at trial, and failure to disclosure exculpatory evidence. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995). The district court granted the petition and set aside Guerra's conviction. *Id.* at 637.

The case of Victor Hugo Saldano, an Argentine arrested and tried in Texas for murder and kidnapping, provides another illustration of the positive impact of consular assistance. The Argentinian consulate, which was monitoring Saldano's trial, informed his counsel that testimony offered by a state witness to support the death penalty was constitutionally impermissible because it urged jurors to consider Saldano's race in determining whether he was a future threat to society. *See* Margaret Mendenhall, *A Case for Consular Notification: Treaty Obligations as a Matter of Life or Death*, 8 Sw. J. L. & Trade Am. 335, 350-51 (2001-02). The consulate then helped Saldano obtain appellate counsel, *id.*, who pursued the issue all the way to this Court. This Court set aside the state court decision that had affirmed Saldano's conviction and sentence. *Saldano v. Texas*, 530 U.S. 1212 (2000).[7]

In contrast, when consular officials are not notified about a foreign national's arrest, the national often fails to invoke basic procedural protections – and usually suffers deleterious consequences as a result. For example, Gregory Madej is a Polish national who was sentenced to death in Illinois even though his consulate was not notified about his arrest or trial. Madej, who was represented by counsel with no death penalty experience, repeatedly failed to take advantage of strategic op-

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[7] On remand, the Texas Court of Criminal Appeals reaffirmed Saldano's conviction and sentence. *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002). Saldano then filed a successful petition for federal habeas corpus, *Saldano v. Cockrell*, 267 F. Supp. 2d 635 (E.D. Tex. 2003), which was upheld on appeal, *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004).

portunities that would have helped him avoid the death penalty. For example, Madej rejected a proposed plea bargain that provided for only life imprisonment, and he failed to collect or present mitigating evidence at his sentencing hearing. Joint Brief for Defendant-Appellant Gregory Madej and Intervenor-Appellant the Consul Gen. for the Rep. of Poland in Chicago at 43-44, *People v. Madej*, 478 N.E. 2d 392 (Ill. 1985). Sixteen years after Madej was convicted and sentenced to death, the Polish Consulate was notified about his arrest. In connection with Madej's habeas petition, the Consulate stated that it would have helped Madej obtain an attorney experienced in death penalty litigation, and that attorney, among other things, likely would have advised Madej to accept the plea bargain and assisted him in obtaining mitigating evidence. *Id.*

Also instructive is the case of Joseph Faulder, a Canadian who was twice convicted and sentenced to death for a murder that occurred during a robbery. *Faulder v. Johnson*, 81 F.3d 515, 517 (5th Cir. 1996). Faulder, who was later determined to have organic brain damage, "presented no affirmative evidence at the guilt phase of either trial, and no mitigating evidence." Kadish, 18 Mich. J. Int'l L. at 578. The Canadian consulate was not notified about Faulder's plight until after the imposition of the second death sentence. Once informed of Faulder's situation, Canadian officials helped Faulder's attorney locate numerous mitigation witnesses – all of whom were available at the time of Faulder's original trial but none of whom testified in that proceeding. Henry Weinstein, *Foreigners on Death Rows Denied Rights, U.S. Says*, L.A. Times, Dec. 10, 1998, at A1. Canadian officials also stated that, had they been informed of Faulder's arrest at the time it occurred, they would have helped Faulder find an attorney who would have pursued his case aggressively from the beginning and who would have brought out evidence of his mental impairment. *Id.* Given Faulder's diminished capacity, the consulate's effort might have enabled him to avoid the death penalty. *Id.* As these cases illustrate, whether or not a foreign national is noti-

fied of his consular rights can determine whether or not he obtains the basic protections that ensure the fairness of our criminal justice system.

2. *Recognizing that the Convention confers enforceable rights will provide a provide a powerful incentive for the United States to comply with the Convention's consular notification requirements*

Unfortunately, notification of consular rights is the exception rather than the rule in United States. Recent studies indicate that less than five percent of foreign nationals sentenced to death received timely notification of their consular rights. *See* Mark Warren, Human Rights Research, *Foreign Nationals and the Death Penalty in the United States* (May 28, 2005), http://www.deathpenaltyinfo.org/article.php?did=198&scid=31 (concluding that "only 7 cases of complete compliance with Article 36 requirements have been identified so far, out of more than 160 total reported death sentences"); Amnesty Int'l, *United States of America: A time for action – Protecting the consular rights of foreign nationals facing the death penalty*, at 4 (Aug. 2001) (observing that, in "virtually every one" of the 120 cases in which foreign nationals were sentenced to death between the reinstatement of the death penalty and 2001, "the arresting authority failed to inform the nationals of their consular rights"). The rate of consular notification appears to be even lower for non-capital cases. For example, an examination of New York City arrest records from 1997 revealed that 53,000 foreign nationals were arrested, but consulates were notified of the arrests in only *four* cases. *See* Warren, *supra*.

The current environment – in which there is no clearly established enforceable right to consular notification – has thus been ineffective in ensuring that the government complies with its obligations under the Vienna Convention. That should not be surprising. As Justice Holmes long ago recognized, "[l]egal obligations that exist but cannot be enforced are ghosts that are

seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). Conversely, judicially enforceable individual rights are powerful tools to promote compliance with legal requirements. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 384 (1982) (noting that an individual right to enforce the Commodity Exchange Act provides "a significant incentive for the exchanges to obey the law"); *Cannon*, 441 U.S. at 705-06 (concluding that a private right of action is "necessary to – the orderly enforcement" of Title IX); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969) (recognizing an enforceable right to compel state compliance with Section 5 of the Voting Rights Act because otherwise the Act "might well prove an empty promise"). By recognizing that the Vienna Convention creates judicially enforceable rights to consular notification and access, the Court can simultaneously honor the Convention's text and reverse this country's unfortunate history of noncompliance with its treaty obligations.

C. Enforceable Rights To Consular Notification and Access Are Critical To The Protection of U.S. Nationals Arrested Abroad

A holding that the Convention confers individually enforceable rights is also important to ensure the fairest possible treatment of U.S. nationals arrested abroad. Consular assistance is critically important to Americans detained in foreign countries. Indeed, consular assistance may be even more vital for U.S. detainees abroad than for foreign detainees in our country. U.S. nationals arrested abroad not only face unfamiliar legal systems but may be more likely than detainees in the United States to confront coercive interrogation or inhumane conditions of detention. Consular involvement guards against those abuses. But U.S. detainees abroad will not seek consular assistance unless other nations comply with their obligations under the Vienna Convention to notify the detainees of their consular rights. And both international law and common sense

teach that foreign nations will not respect their Vienna Convention obligations unless the United States respects its own.

1. Consular notification and assistance are necessary to ensure fair treatment of U.S. nationals detained abroad

Every year, millions of Americans travel to foreign countries or choose to live outside the United States. According to the State Department, "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the U.S. each year." Bureau of Resource Management, U.S. Department of State, *FY2004 Performance and Accountability Report* (2004), *available at* http://www.state.gov/s/d/rm/rls/perfrpt/2004/html/39024.htm. Moreover, the number of Americans who venture abroad is increasing. The United States issued a record total of 8.8 million passports in 2004, an increase of 1.5 million from the previous year. *Id.*

Millions of Americans are therefore at risk of being arrested by a foreign criminal justice system. Every year, that risk becomes an unfortunate reality for thousands of U.S. nationals. The State Department's Bureau of Public Affairs estimates that "more than 2,500 American citizens are arrested abroad" each year. Bureau of Public Affairs, U.S. Department of State, *International Travel Safety Information for Students* (2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/29556.htm. Less formal detentions increase that number significantly, so that the total number of Americans arrested or detained abroad annually is almost 6,000. Kevin Herbert, Managing Director of the Office of Overseas Citizens Services, U.S. Department of State, *The Terrorist Threat to American Presence Abroad*, Part II, Threat to Citizens Overseas, University of Virginia, Apr. 12-13, 1999, http://www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm.

Often "the only people [American detainees] can turn to for help are American diplomats." Statement of R. Nicholas Burns, State Department Spokesperson (Sept. 29, 1995),

http://www.hri.org./docs/statedep/1995/95-09-29.std.html. As the State Department has explained, providing that assistance is the "most important function" of U.S. consular officers. U.S. Department of State, 7 FAM § 412. Indeed, in 2004 alone, consular officials paid 6,920 visits to Americans abroad. Daniel B. Smith, Principal Deputy Assistant Secretary for Consular Affairs, Testimony Before the U.S. House of Representatives, Comm. on International Relations (May 12, 2005), *available at* http://www.house.gov/international_relations/109/smi051205.pdf.

American consular officers provide arrested U.S. nationals with a broad range of assistance, both legal and humanitarian. Consular officers provide U.S. detainees with the names of reputable lawyers and other information about local legal aid. 7 FAM § 422. Consular officials explain the legal and judicial procedures of the foreign government and the detainee's legal rights. *Id.* Consular officers also intervene with foreign governments on behalf of detained Americans, where necessary, to "forestall physical abuse" and "to demand medical attention" and "a prompt investigation" when physical abuse has occurred. *Id.* In addition, consular officers ensure that detained Americans have basic necessities such as food and water, *id.* at § 423.9, offer to contact family or friends, *id.* at § 423.7, and take steps to protect the detainees' personal property, *id.* at § 423.8.

For many U.S. nationals arrested abroad, consular assistance makes the difference between fair treatment and capricious punishment. For example, in December 2004, consular officials helped secure the release from custody of Avnish Bajaj, a U.S. citizen and CEO of an Indian online auction house wholly owned by eBay. Paul Watson, *India Roiled by Internet Sex Case*, Boston Globe, Dec. 22, 2004, *available at* http://www.boston.com/news/world/asia/articles/2004/12/22/india_roiled_by_internet_sex_case. Bajaj was arrested in Delhi after pornographic materials were unwittingly sold on his com-

pany's website. A lower court ordered that Bajaj be held in jail without bail. After receiving notification of his predicament, the American consulate informed high-ranking State Department officials, and the U.S. government placed diplomatic pressure on India to ensure that Bajaj received fair treatment. In addition, consular officials visited him in detention and attended the appellate hearing that resulted in his release. *Avnish Bajaj's Arrest Worries Colin Powell*, Agence France-Presse, Dec. 21, 2004, *available at* http://avnish-bajaj-news.newslib.com/story/1186676.

In stark contrast to Bajaj's case stands the example of Robert Fielding, a U.S. citizen seized from his hotel by Belarusian authorities in 2001. Fielding, who did not receive consular notification or assistance, was "subjected to a 10-hour interrogation by law enforcement officials who just 'happened' to be accompanied by the television cameras of Belarusian National Television .... During this entire interrogation process, he was denied the right to legal counsel, forced to sign a statement, and subjected to being filmed by the state-controlled Belarusian National Television that later showed parts of this interrogation on its prime-time national 'news' program 'Rezanans' less than 24 hours after his deportation." Embassy of the United States of America, Embassy Statement on Detention and Deportation of U.S. Citizen Robert Fielding, Aug. 29, 2001, http://minsk.usembassy.gov/html/fielding.html. Moreover, after his brutal interrogation, Fielding was forced to leave Belarus for Poland without the opportunity "to gather any of his personal belongings from his legally-registered residence in Minsk." *Id.*

The ability of U.S. consulates to provide assistance to Americans detained abroad hinges on whether consular officials receive prompt notification of the detentions. As the State Department Foreign Affairs Manual instructs consular officers, "[p]rompt notification is the necessary first step in obtaining early access to the arrestee." 7 FAM § 421. And

early access is the linchpin to ensuring that U.S. detainees receive fair treatment. "With early access to each prisoner [consular officials] can go a long way towards guaranteeing against mistreatment and forced statements at the time of arrest," and can provide timely "information about responsible legal counsel and judicial procedures." Leonard F. Walentynowicz, Bureau of Security and Consular Affairs, U.S. Department of State, U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94 Cong., 1st Sess. Part II, at 6 (1975). The State Department therefore instructs consular officials that "it is essential that [they] obtain prompt notification whenever a U.S. citizen or national is arrested." 7 FAM § 421. And the Department identifies the Vienna Convention as the principal authority through which consular officers can obtain the necessary notification. *Id.* § 421.1; *see id.* § 413.1. Thus, compliance by other nations with their consular notification obligations under the Convention is crucial for the protection of Americans abroad.

2. *Foreign nations will not honor the Vienna Convention's consular notification requirements unless the United States ensures that the requirements are enforced in this country*

Foreign nations are unlikely to comply with the Convention's consular notification requirements unless the United States also complies with those requirements. As this Court has long recognized, "mutuality and reciprocity" are the foundation of international law. *Hilton v. Guyot*, 159 U.S. 113, 228 (1895); *see Souffront v. La Compagnie Des Sucreries De Porto Rico*, 217 U.S. 475, 483 n.9 (1910). It is therefore unreasonable to expect other nations to comply with their treaty obligations if the United States refuses to comply with its own. That conclusion follows not only from basic principles of international law but from fundamental precepts of human relations. *See* H.T.D. Rost, *The Golden Rule: A Universal Ethic* (1986). Thus, if the United States does not ensure that foreign

nationals arrested in this country are notified of their consular rights, other nations are likely to respond in kind.

The State Department is well aware of that reality. Then-Secretary of State Madeline Albright described the situation succinctly in a 1998 letter to then-Governor of Texas George W. Bush. The Secretary observed that "[w]e must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad." *See* Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 Leiden J. Int'l L. 367, 376 (2002) (quoting Secretary of State Albright). Similarly, the State Department instructs state and local law enforcement officials that their rigorous adherence to the Convention's requirements "will permit the United States . . . to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad." U.S. Department of State, Consular Notification and Access at 13.

The same sentiments have been echoed by numerous judges reviewing legal challenges by criminal defendants who were denied their consular rights. As Judge Butzner eloquently stated in *Breard v. Pruett*, "United States citizens are scattered about the world as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring); *see also United States v. Carrillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999) ("If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens."); *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999) (Chapel, J., concurring) ("Why should Mexico, or any other

signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. governmental official we ought to remember these cases.").

There is, of course, no guarantee that other nations will respect the rights of U.S. nationals under the Vienna Convention, no matter how scrupulously the United States respects the rights of foreign nationals, and no matter how this Court rules in these cases. But rigorous compliance with the Convention by the United States will provide a strong incentive for other nations to comply. And recognition that the Convention confers judicially enforceable rights will provide a powerful mechanism to ensure compliance by the United States. Even more important, the existence of individual rights is firmly grounded in the text of the Convention and supported by other interpretive considerations. This Court should therefore hold that the Convention creates enforceable, individual rights to consular notification and access.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefs of petitioners, the judgments of the Supreme Courts of Virginia and Oregon should be reversed.

Respectfully submitted.

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MOISES SANCHEZ-LLAMAS
Petitioner,
v.
STATE OF OREGON,
Respondent.

MARIO BUSTILLO,
Petitioner,
v.
GENE M. JOHNSON, DIRECTOR OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia and the Supreme Court of Oregon

BRIEF OF *AMICI CURIAE* BAR ASSOCIATIONS, HUMAN RIGHTS ORGANIZATIONS AND OTHER LEGAL GROUPS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted in support of Petitioners by several organizations, including bar associations, human rights and civil rights organizations, and other legal groups.[1] *Amici* include: Amnesty International USA, Bar Human Rights Committee of England & Wales, Center for Justice & Accountability, The Constitution Project, Hispanic National Bar Association, Human Rights Advocates, Human Rights First, Human Rights Watch, League of United Latin American Citizens, Mexican American Bar Association, Mexican American Legal Defense and Educational Fund, Minnesota Advocates for Human Rights, and the Robert F. Kennedy Memorial Center for Human Rights.

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political

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[1] *Amici Curiae* certify that this brief is filed with written consent of all parties, said consents having been lodged with the Court. Sup. Ct. R. 37.2(a). They also certify that no counsel for either party authored the brief in whole or in part and that no person or entity, other than *amici curiae*, their members, and their counsel, made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

ideology or economic interest. In line with the organization's international focus, Amnesty International USA joins this brief on matters of international law.

The Bar Human Rights Committee of England & Wales (BHRC) is an independent group of specialist advocates and experts who work on a voluntary basis to develop law and human rights protection throughout the world. BHRC objectives are: supporting and protecting lawyers and judges who are threatened or oppressed in their work; upholding the rule of law and internationally recognized human rights standards; furthering interest in and knowledge of human rights and the laws relating to human rights; advising, supporting and co-operating with other organizations and individuals working for human rights; and advising the Bar Council in connection with any human rights issue.

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human rights abuses around the world by helping survivors hold perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human rights standards under United States and customary international law.

The Constitution Project seeks consensus solutions to difficult legal and constitutional issues. It does this through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Constitution Project has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. It has testified before federal and state legislative committees, and its work has been cited in numerous reports and studies by government agencies, the media, and law and policy organizations. The Constitution Project has released a report, *Mandatory Justice: The*

Death Penalty Revisited, which recognizes the role of the Vienna Convention in protecting the rights of foreign nationals in capital cases. The Constitution Project recognizes the implications of this case for protecting these rights.

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. The HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates. Proper application of Article 36 of the Vienna Convention is of particular interest to the HNBA, given its largely bilingual membership and its commitment to the rule of law. Its signatory representative was a participant in the Vienna Convention Discussion Group, which led to the decision of the Oregon Department of Justice to adopt new policies to improve compliance with the Convention, as noted in the letter of April 25, 2002 from the Deputy Attorney General to William Howard Taft IV, Legal Advisor in the United States Department of State.

Human Rights Advocates is a non-profit organization that provides education about the application of international human rights in both domestic and international fora. Its ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has appeared as *amicus curiae* before a number of U.S. courts including the United States Supreme Court, the Second, Fifth, Ninth, and Tenth Circuit Courts of Appeals, and the California

Supreme Court. Human Rights Advocates also appears before international fora including the Inter-American Commission on Human Rights, the United Nations Commission on Human Rights, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Human Rights First works in the United States and abroad to create a more secure and humane world by advancing justice, human dignity, and respect for the rule of law. It protects refugees in flight from persecution and repression and in seeking legal relief in the United States; works to ensure that domestic legal systems incorporate stronger human rights protections; helps build a stronger international system of justice and accountability for the worst human rights crimes; works with and supports human rights activists who fight for basic freedoms and peaceful change at the national level; and promotes fair economic practices through stronger safeguards for workers' rights. Human Rights First has filed numerous *amicus* briefs before the U.S. Supreme Court and other U.S. courts and international bodies.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed *amicus* briefs before various bodies, including U.S. courts and international tribunals.

The League of United Latin American Citizens

(LULAC) is the largest and oldest Hispanic civil rights organization in the United States. With over 115,000 members in virtually every state of the nation, LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans. For more than 75 years, LULAC's members have sought to ensure the civil rights of Hispanics throughout the United States and foster respect for the rule of law. We believe in the democratic principle of individual freedom and are obligated to promote, protect and assure the constitutional and statutory rights of all Hispanics, regardless of immigration status.

The Mexican American Bar Association (MABA) is one of the most prominent and largest Latino bar associations in Southern California and the nation. MABA is a volunteer entity, with its success resting on the commitment of its members and supporters. MABA members include over 800 attorneys, judges, politicians, and business people of various ethnic backgrounds. Aside from being pacesetters in their respective fields of law, MABA members maintain prominent roles in local government and in all media avenues such as radio, television and journalistic mediums. MABA is committed to the advancement of Latinos in the legal profession and the empowerment of the Latino community through service and advocacy.

The Mexican American Legal Defense & Educational Fund (MALDEF) is a national non-profit organization whose mission is to protect the civil rights of the more than 40 million Latinos living in the United States. Through its work, MALDEF recognizes the importance of ensuring that all foreign nationals are assured the rights afforded by law, including the right to confer with their native consulates.

Minnesota Advocates for Human Rights (Minnesota Advocates) is a volunteer-based non-profit organization

committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 25 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals. Minnesota Advocates has previously submitted *amicus curiae* briefs in numerous cases, including cases before the Inter-American Court of Human Rights.

The Robert F. Kennedy Memorial Center for Human Rights (CHR) is a non-profit organization working to advance Robert F. Kennedy's vision of social justice by promoting the full spectrum of human rights throughout the world. The annual RFK Human Rights Award honors individuals who, at great risk, stand up to government oppression in the nonviolent pursuit of respect for human rights. The CHR develops and carries out projects, which enhance and complement the social change agendas of the laureates. Their work includes advocacy and legal projects with the U.S. and foreign governments, international agencies and other human rights organizations. The CHR has promoted the respect and implementation of the legal norms related to human rights at a domestic and international level, including cases before the International Labor Organization, the Inter-American Commission on Human Rights, and the World Bank Inspection Panel, encouraging both the U.S. and foreign governments to respect the human rights of their citizens and foreign nationals within their respective territories. These efforts

will have little substance so long as the United States continues to ignore international law regarding the rights of foreign nationals in its territory.

Each of these organizations recognizes the importance of the rule of law and U.S. compliance with international law. *Amici* have observed firsthand the negative consequences that arise when federal, state, and local governments fail to comply with international law. Regrettably, such issues arise on an almost daily basis. While the United States has ratified the Vienna Convention on Consular Relations, *done* Apr. 24, 1963, 21 U.S.T 77, 596 U.N.T.S. 261 ("Vienna Convention"), state and local governments have failed to comply fully with its obligations. Noncompliance is compounded by the refusal of federal courts to provide meaningful review and reconsideration of Vienna Convention violations. Without appropriate guidance from this Court, state courts and lower federal courts will continue to disregard international law and U.S. treaty obligations as the Supreme Courts of Virginia and Oregon have done.

While *Amici* pursue and protect a wide variety of legal interests, they all share a deep commitment to the rule of law. Thus, the participation of *Amici* will assist this Court in understanding the negative implications and practical consequences of U.S. failure to comply with the Vienna Convention.

SUMMARY OF ARGUMENT

Long before these cases arose, the Executive and Legislative branches of the United States government made the policy choice entrusted to them by the United States Constitution to ensure reciprocal protection for U.S. citizens abroad by negotiating and ratifying the Vienna Convention. Article 36 of the Vienna Convention provides

that foreign nationals must be informed of their right to seek consular assistance when detained.[2] It is firmly established that Article 36 creates individual rights and that the United States is legally obligated to recognize these rights in its courts.

Respect for the rule of law is an essential component of U.S. foreign policy. Foreign governments expect, therefore, that the United States will comply with its obligations under the Vienna Convention, a duly ratified treaty. Indeed, it is in our national interest to do so. The Vienna Convention protects vulnerable migrants in our country. But it also protects U.S. citizens abroad, including tourists, business travelers, and military personnel. Failure to adhere to the obligations set forth in the Vienna Convention will undermine consular assistance in the United States and violations will inevitably be replicated abroad.

In *Bustillo v. Johnson*, No. 042023 (Va. March 7, 2005) and *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005), two state courts have completely disregarded the Vienna Convention. Quite simply, the failure of these courts to respect U.S. treaty obligations undermines the rule of law,

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[2] These branches also negotiated and ratified the related Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77 ("Optional Protocol"). The Optional Protocol vests the International Court of Justice ("ICJ") with jurisdiction to resolve disputes over the interpretation and application of the Vienna Convention. Although the United States recently withdrew from the Optional Protocol, this withdrawal does not change the U.S. agreement to fulfill its obligations under the Vienna Convention. Nor does the U.S. decision to withdraw from the Optional Protocol change the U.S. position on the Vienna Convention itself: specifically, that the substantive guarantees of the Vienna Convention should be enforced by local, state, and federal authorities.

long a central feature of U.S. foreign policy. These state court decisions also threaten the ability of consular officials to effectively protect the interests of their nationals. Because the protections afforded by the Vienna Convention are reciprocal in nature, noncompliance by the United States will be replicated abroad, harming the interests of U.S. citizens that travel and work around the world.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention and with the U.S. policy of promoting a unified rule of law that respects our international obligations.

ARGUMENT

I. RESPECT FOR THE RULE OF LAW IS AN IMPORTANT COMPONENT OF U.S. FOREIGN POLICY

Throughout its history, the United States has consistently asserted that violations of international law have serious consequences for international order.[3] No less a realist than former Secretary of State Henry A. Kissinger

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[3] The United States has repeatedly asserted that international law is "the web of mutual obligation which binds us together . . . [and] shields us from chaos and from disorder." Memorial of United States of America, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 228 (Dec. 29, 1979) (*quoting* Secretary of State Cyrus Vance, Remarks to U.N. Security Council). Moreover, the failure to redress violations of international norms "promotes repetition" of violations, eroding international order. Or. Arg. of United States, United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1982 I.C.J. Pleadings 255.

has noted that "[t]he United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity." Henry A. Kissinger, *International Law, World Order, and Human Progress*, 73 Dep't St. Bull., 353, 354 (Sept. 8, 1975). *See also* Charles N. Brower, Acting Department of State Legal Adviser, *International Law as an Instrument of National Policy*, 68 Dep't St. Bull., 644, 644 (May 21, 1973) ("States comply with [international] law . . . because it is politic to do so."); John Foster Dulles, Testimony Before Congress Regarding the Ratification of the U.N. Charter, *quoted in* Ambassador Madeleine K. Albright, *Enforcing International Law*, Speech Before the Philadelphia Bar Association at 9 (June 15, 1995), *at* http://dosfan.lib.uic.edu/ERC/law/press_statements/950615.html ("As a nation, we have, more than any other, striven for the supremacy of law as an expression of justice. Now, we are seeking to establish world order based on the assumption that the collective life of nations ought to be governed by law—law as formulated in the Charter of the U.N. and other international treaties, and law as enunciated by international courts.").

In addition, the United States has promoted respect for international law because it reflects important American values; "[i]t is a repository of our experience and our idealism." Kissinger, *supra*, at 354. Accordingly, U.S. administrations have repeatedly reaffirmed the commitment of the United States to honoring its international law obligations. *See, e.g.*, Madeleine K. Albright, *U.S. Efforts to Promote the Rule of Law*, Remarks at the Condon-Falkner Distinguished Lecture, University of Washington School of Law, *in* U.S. Dep't of St. Dispatch, Nov. 1998, at 6 ("Law is a theme that ties together the broad goals of our foreign policy."); Letter from President Ford to Seymour J. Rubin, *reprinted in* States-International Status, Attributes, and Types: Rights and Duties of States: Nonintervention in

Internal Affairs 1975 *Digest* § 1, at 16 ("It is my intention that the Government of the United States shall observe international law and endeavor to promote its strengthening in all areas to which it applies."); Kissinger, *supra*, at 362 ("[D]edication to international law has always been a central feature of our foreign policy.").

In recent years, the Bush administration has reaffirmed the important role that the rule of law plays in U.S. foreign policy. U.S. Secretary of State Condoleezza Rice has emphasized the importance of the rule of law in promoting stability and cooperation throughout the world:

> America is a country of laws. When we observe our treaty and other international commitments, our country -- other countries are more willing to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.

U.S. Secretary of State Condoleezza Rice, Remarks at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), *at* http://www.state.gov/secretary/rm/2005/44159.htm. Similarly, the U.S. Deputy Permanent Representative to the United Nations noted in remarks to the U.N. Security Council:

> [E]stablishing and maintaining the rule of law has been an enduring theme of

> American foreign policy for over two centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated.

Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, Statement on Justice and the Rule of Law to the U.N. Security Council at 1 (Sept. 24, 2003), *at* http://www.un.int/usa/03_147.htm. Thus, promotion of the rule of law historically has been a defining value of U.S. foreign policy and a key strategy for promoting peace and stability throughout the world.

> As a nation founded by law, the United States is the unflagging champion of the rule of law. By working together in support of the rule of law, we believe the international community can strengthen the peace and help conflict-ridden societies build a better future. For two hundred years, this has been our firm conviction and practice, and it will remain our first article of faith.

Id. at 2. *See also* Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, Remarks to the Center for Strategic and International Studies at 1 (May 6, 2002), *at* http://www.state.gov/p/9949.htm ("Let me get right to the point. . . . Here's what America believes in: We believe in justice and promotion of the rule of law.").

Foreign governments, therefore, expect that the United

States will be a leader in complying with the obligations set forth in the Vienna Convention. In so doing, it demonstrates to "the world that the United States does indeed take its international law responsibilities seriously." William Howard Taft IV, U.S. Department of State, Legal Adviser, Remarks to the National Association of Attorneys General at 5 (March 20, 2003), *at* http://usinfo.state.gov.

In sum, the interests of all persons – from foreign nationals in the United States to Americans abroad – are best served by adherence to the rule of law as embodied in the Vienna Convention. Failure to adhere to the rule of law would compromise this most American value and would undermine the work that *Amici* do.

II. THE CONSULAR ASSISTANCE PROVISIONS OF THE VIENNA CONVENTION ARE ESSENTIAL FOR PROTECTING THE RIGHTS OF FOREIGN NATIONALS

Governments have long recognized the importance of consular relations. Luke Lee, Consular Law and Practice 3-7 (2d ed. 1991); Oppenheim's International Law 1132-34 (Robert Jennings and Arthur Watts eds., 9th ed. 1992); Constantin Economides, *Consuls*, *in* 1 Encyclopedia of Public International Law 770 (Rudolf Bernhardt ed. 1992). The Vienna Convention on Consular Relations, which was adopted in 1963 and has been ratified by 168 countries, has been referred to as "undoubtedly the single most important event in the entire history of the consular institution." Lee, *supra*, at 27.

The Vienna Convention defines and guarantees consular rights, privileges, and duties among signatory

states.[4] One of the most important responsibilities of consular officials is to protect their nationals. Accordingly, Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, their nationals at all times. Foreign nationals shall have the same freedom of communication and access to consular officials. A particularly sensitive issue arises when a foreign national is detained by law enforcement officials. In these cases, Article 36(1)(b) of the Vienna Convention provides that law enforcement officials of signatory states must notify detained foreign nationals that they have a right to communicate with, and have access to, their consular officials. If the detained national makes such a request, the appropriate consular post must be notified. In addition, Article 36(1)(c) grants consular officials the right to visit, converse and correspond with detained foreign nationals and to arrange for their legal representation. Finally, Article 36(2) provides that the laws and regulations of each signatory state must enable full effect to be given to these rights. In sum, Article 36 of the Vienna Convention serves two broad goals. Through consular assistance, foreign nationals can gain a greater awareness of the nature and scope of the legal proceedings that affect them. At the same time, consular assistance allows foreign governments to monitor the safety and fair treatment of their nationals in such proceedings.

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[4] Article 5 of the Vienna Convention lists a number of consular functions. These cover a wide variety of responsibilities, including: furthering the development of commercial, economic, cultural and scientific relations between signatory states; issuing passports and travel documents; serving as a notary and civil registrar; and transmitting judicial documents or executing letters rogatory or commissions to take evidence.

It is essential to recognize the purpose of consular assistance when interpreting Article 36.[5] Foreign nationals are at a distinct disadvantage when detained by law enforcement officials.[6] Indeed, migrants are a particularly vulnerable group.[7] They may have a poor command of the

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[5] It is a fundamental canon of interpretation that "[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Restatement (Third) of the Foreign Relations Law of the United States § 325(1) (1987). *See also* Norfolk Southern Ry. v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 397 (2004) *citing* Green v. Biddle 21 U.S. 1, 89 (1823) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.").

[6] *See, e.g.*, Amnesty International, United States of America: Osvaldo Torres, Mexican National Denied Consular Rights, Scheduled to Die (Apr. 2, 2004), *available at* http://web.amnesty.org/library/Index/ENGAMR510572004. ("A primary task of all consuls is to render assistance to their citizens abroad and to see that they receive fair, equal and humane treatment while in custody. Consular access and assistance are indispensable whenever foreign nationals face prosecution and incarceration under local legal systems, especially when a death sentence may result. Timely consular intervention ensures that foreign detainees understand their legal rights and have the means to mount a proper defence.").

[7] Unsurprisingly, agreements concerning the rights of migrants emphasize the significance of consular assistance. For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *entered into force* Dec. 18, 1990, art. 16(7) (Dec. 18, 1990), requires that consular notification information be provided to a migrant worker or a member of his or her family when arrested or detained in other manner. Significantly, the provision is almost identical to Article 36 of the Vienna Convention. *See also* U.S. Department of State, Implementing the Summit of the Americas Migrant Workers Initiative (Apr. 7, 2000) ("[T]he United States takes the position that all foreign nationals are entitled to

English language and will likely be unfamiliar with the U.S. criminal justice system. Their understanding of the entire criminal process, including the role of law enforcement officials, public defenders, and judges, may be profoundly influenced by experiences in their countries of origin. Accordingly, consular officials act as a cultural bridge to foreign nationals. While consular officials do not provide legal advice, they provide foreign nationals with critical information that allows them to understand any legal advice provided by defense attorneys. Thus, consular assistance is fundamentally and qualitatively distinct from assistance provided by defense counsel.

In light of these considerations, it is not surprising that the International Court of Justice has indicated that Article 36 creates individual rights and that signatory states must protect these rights.[8] On two occasions, the ICJ has definitively interpreted the Vienna Convention in cases involving foreign nationals who were not informed of their right to seek consular assistance in the United States.[9] *See LaGrand Case* (F.R.G. v. U.S.) 2001 I.C.J. 104 (June 27) ("*LaGrand*"); *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. (March 31) ("*Avena*").

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consular notification and access, regardless of their visa or immigration status in the United States. Thus 'illegal' aliens have the same rights to consular assistance as do 'legal' aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.").

[8] To reiterate, the U.S. decision to withdraw from the Optional Protocol has no bearing on the ICJ's authoritative and binding interpretations of the Vienna Convention.

[9] The opinions of the International Court of Justice are available at www.icj-cij.org.

In June 2001, the ICJ considered the Vienna Convention in an action filed by Germany against the United States. *LaGrand*, *supra*. In *LaGrand*, the ICJ held that Article 36(1) of the Vienna Convention creates individual rights and the clarity of these provisions "admits of no doubt." *LaGrand*, para. 77. The ICJ went on to find that the United States had violated those rights and that procedural default rules could not be used to bar a defendant from making a Vienna Convention claim. *Id.* para. 91.

In March 2004, the ICJ considered the Vienna Convention in an action filed by Mexico against the United States. *Avena*, *supra*. In *Avena*, the ICJ affirmed that the Vienna Convention creates individual rights. *Avena*, para. 40. It then held that the United States violated the rights of fifty-one Mexican nationals. *Id.*, para. 153. To remedy these violations, the ICJ ruled that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals" and take into account the rights set forth in Article 36 as well as relevant portions of the *Avena* judgment. *Id.*, para. 153(9). The ICJ specified that review and reconsideration must be effective and provide "a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.*, para. 139. The ICJ also reaffirmed that the procedural default rule cannot be used to preclude a defendant from raising a Vienna Convention violation. *Id.*, para. 134. Application of procedural default rules would effectively nullify the right to review and reconsideration as mandated by the ICJ. Significantly, the ICJ stated that its conclusions applied to all foreign nationals subject to similar situations in the United States.

> To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.

Id., para. 151.

In sum, the Vienna Convention is essential for protecting the rights of foreign nationals. As a signatory to the Vienna Convention, the United States is obligated to protect these rights. But this has not occurred.

III. FAILURE TO COMPLY WITH THE VIENNA CONVENTION WILL UNDERMINE CONSULAR ASSISTANCE IN THE UNITED STATES AND VIOLATIONS WILL BE REPLICATED ABROAD

Over thirty years ago, the United States, through the power granted to its Executive and Legislative branches of government by the United States Constitution, made the policy choice to sign and ratify the Vienna Convention,

making it and its attendant provisions the supreme law of the land. *See* U.S. Const. art. II, § 2, cl. 2 & art. VI, cl. 2.

On April 24, 1963, the United States signed the Vienna Convention. The Senate subsequently approved the Vienna Convention on October 22, 1969, and it was formally ratified on November 12, 1969. The instrument of ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969. As the U.S. State Department has indicated, the Vienna Convention creates obligations that are binding on federal, state, and local governments. *See* U.S. Dep't of St., *Consular Notification and Access* 44 (2005), *available at* http://travel.state.gov/pdf/CNA_book.pdf.[10]

The consular posts of governments throughout the world, including those of the United States, follow a settled body of procedures to implement the rights afforded by the Vienna Convention for their respective nationals detained abroad. In the event a national is arrested or otherwise detained within a foreign country, Paragraph 1 of Article 36 of the Vienna Convention sets out that "consular offices shall have the right to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." Vienna

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[10] The United States became obligated to comply with the Vienna Convention immediately upon ratification, and no implementing legislation was necessary. Upon submitting the Vienna Convention to the Senate, the Executive branch stated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. at 2 & 5 (1969) (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser). More recently, the U.S. State Department has indicated that "[i]mplementing legislation is not necessary . . . because executive, law enforcement, and judicial authorities can implement these obligations through their existing powers." Consular Notification and Access, *supra*, at 44.

Convention, art. 36, para. 1(c).

All U.S. Foreign Service posts are instructed to ensure that the protections of the Vienna Convention are provided to U.S. citizens abroad. *See* U.S. Dep't of St., 7 *Foreign Affairs Manual*, *available at* http://travel.state.gov/pdf/CNA_book.pdf. As our consular officials are informed, "[f]ew of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." *Id.* § 412 (Sept. 1, 2004). U.S. policy includes the prompt delivery of key information to detained individuals after their arrest. These materials include information regarding judicial procedures the individual is likely to experience, § 415.3 (Sept. 1, 2004), and tailored lists of lawyers with details including languages spoken and specialties. *Id.*, § 415.4 (Sept. 1, 2004); § 991 (Aug. 30, 1999); § 992 (Aug. 30, 1994). Under the State Department's *Foreign Affairs Manual*, consular officers are expected "to be particularly active in, and to fully engage in, the [detained individual's] case during the often-lengthy pretrial period." *Id.*, § 432 (Aug. 26, 2004). The *Foreign Affairs Manual* also indicates that consular officers should frequently visit detained nationals to "monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services" as well as to "keep prisoners updated on any developments that may relate to their cases such as information obtained from defense counsels, prosecutors, [and] judges." *Id.*, § 433.1 (Aug. 26, 2004). These practices continue into the appellate stage, where U.S. policy instructs consular officers to continue providing appropriate services, including acting as a liaison to the detained individual's attorney and judicial authorities. *Id.*, § 454 (Oct. 28, 2004).

U.S. consular posts are not unique in the services they

provide. For example, Mexican consular officials offer specific assistance to Mexican nationals detained in the United States. *See Torres v. Oklahoma*, No. PCD-04-442, at 10 (Okla. Crim. App. May 13, 2004) (Chapel, J., specially concurring). Pursuant to Mexico's procedures, "[c]onsular officials monitor defense counsel's efforts, speak regularly with defense counsel, the defendant and his family, and attend court proceedings." *Id.* (Chapel, J., specially concurring). Consular officials also assist in gathering evidence and providing funds for experts, investigators, DNA testing, and jury consultants. *See id.* at 10-11 (Chapel, J., specially concurring). The Mexican government also "obtains and provides official documents from institutions in Mexico such as schools and hospitals, searches for criminal records, and assists attorneys traveling in Mexico with logistical support, translators, and witness identification and preparation." *Id.* at 11 (Chapel, J., specially concurring).

If U.S. courts fail to honor the Vienna Convention, the procedures developed by foreign governments to assist and protect the rights of their citizens are of little benefit. These same rights afforded by the Vienna Convention to Americans abroad would also be jeopardized. The protections of the Vienna Convention are reciprocal in nature, and U.S. noncompliance will inevitably be replicated abroad. This basic feature of international law – its reciprocal nature – is recognized and accepted by the United States.[11] The U.S. Legal Adviser has acknowledged the reciprocal nature of the Vienna Convention:

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[11] As the U.S. government has repeatedly asserted "[r]eciprocity . . . underlies all relations between nations." Brief of the United States at 17 n.11, *Boos v. Barry*, 485 U.S. 312 (1988) (arguing that special security restrictions around foreign embassies were justified as a

> These obligations were all entered into as part of a very aggressive effort of the United States Government to protect American citizens abroad. To get protection for Americans abroad in our treaties, it was necessary to provide reciprocal protections to foreign nationals in the United States. We obviously can't insist that other countries comply and then not comply ourselves. So it is both right and fair that we comply.[12]

Taft, *supra*, at 15. Significantly, the *Foreign Affairs Manual* also recognizes the reciprocal nature of Vienna

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necessary part of our reciprocal obligations under the Vienna Convention on Diplomatic Relations and asserting that in "appealing to the justice and the humanity of [other] governments to protect our embassies. . . at least we must show some intent upon our part to treat their embassies and their consulates in our country the same way."). *See also* Geofroy v. Riggs, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.").

[12] A similar statement was issued by the U.S. Department of State in a case involving a Paraguayan national who was executed in Virginia and who was never informed of his Vienna Convention rights. According to the Department of State, "[w]e fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State, Released in Asuncion, Paraguay (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html.

Convention obligations and the implications of non-compliance in the United States. It acknowledges that foreign governments may not comply with Vienna Convention obligations because "U.S. authorities do not always promptly notify that country's consular representatives of the arrest of one of their nationals." U.S. Dep't of St., 7 *Foreign Affairs Manual* § 421.2-3 (Sept. 3, 2004). In these situations, U.S. consular officials are instructed to point out that "[e]ven where this might be true, it does not exempt the host government from its treaty obligations. Two wrongs do not make a right. We should all work toward improved compliance with consular notification obligations." *Id.* at 421.2-3(a).

There are many reasons why countries comply with international law, "including the unarticulated recognition by states generally of the need for order, and of their common interest in maintaining particular norms and standards . . . ." Restatement (Third), *supra*, at pt I (intro. note). Reciprocity also promotes cooperation and compliance. Accordingly, the United States must recognize the consequences of violating the Vienna Convention, both for the national interest and for the well-being of its citizens.

CONCLUSION

In *The Western Maid*, 257 U.S. 419 (1922), Justice Holmes noted that "[l]egal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *Id.* at 433. This Court must affirm and give effect to the obligations of the United States under the Vienna Convention or risk transforming the rule of law into a ghostly apparition that is seldom seen and never heard. This latter outcome does not serve the interests of the United States, the interests of its citizens, or the *Amici*,

who seek to promote respect for the rule of law in their own work on a daily basis.

For these reasons, this Court should reverse the judgments of the Supreme Courts of Virginia and Oregon and grant relief that is consistent with the obligations set forth in the Vienna Convention.

Dated: December 20, 2005

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DEC 2 1 2005

NOS. 04-10566 AND 05-51

In The Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner

v.

OREGON

Respondent.

MARIO A. BUSTILLO,

Petitioner

v.

GENE M. JOHNSON, DIRECTOR OF VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

BRIEF OF AMICI CURIAE THE EUROPEAN UNION AND MEMBERS OF THE INTERNATIONAL COMMUNITY IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The European Union (EU) considers the respect for treaty based rights to be of vital importance both nationally and within the international community. This principle is common to its twenty-five Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Like the United States, all EU Member States are party to the Vienna Convention on Consular Relations (VCCR).[2] Article 36 of the VCCR (Article 36) confers both individual and State rights. As such, the EU has an interest in securing compliance with rights guaranteed under Article 36. This position has been expressed to the Government of the United States through specific demarches in cases involving individual foreign nationals who have been deprived of their rights under Article 36.[3]

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[1] In accordance with Supreme Court Rule 37.6, *amici* represent that no party other than *amici* and counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici* and counsel, have made a monetary contribution to the preparation or submission of this brief. Global consent letters from all parties for all *amicus curiae* briefs are on file with the Clerk of the Court. Counsel acknowledge the valuable coordination and research for this project from Anne James, Executive Director and Joanne Cecil, Project Assistant, International Justice Project.

[2] *Opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[3] Demarches in the cases of foreign nationals were transmitted in each of the following: Javier Suarez Medina, Texas (Mexican), 23 July, 2002; Hung Thanh Le, Oklahoma (Vietnamese), 4 December, 2003; Gerardo Valdez, Oklahoma (Mexican), 13 July, 2001; Osvaldo Torres, Oklahoma (Mexican) 30 April, 2004. All these communications can be found on the Internet, *EU Policy and Action on the Death Penalty, at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionnonUSDeathRowCases. See, also European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (June 3, 1998), Part III(v) *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm.

As nations committed to the rule of law, the Member States of the EU have a fundamental interest in compliance with international instruments, particularly when the rights of a Member State's national may be in the balance.

The EU believes that it can provide this Court with a special and unique perspective that is not available through the views of the parties.

Liechtenstein, Norway and Switzerland have explicitly expressed to the European Union and its Member States their shared interest as *amici* and their support for the arguments put forward in the present brief.

The positions taken in the following arguments, while expressed as those of the European Union, are shared by all signatories to the brief.

SUMMARY OF ARGUMENT

Article 36 confers on detained foreign nationals a right to be informed, without delay, by the arresting authority, of the right to contact consular officers of the Sending State. The right to be so informed is an individual right (as well as a right accorded to the Sending State). If the foreign national is convicted without being informed of the rights under Article 36, that individual must be allowed to apply to a court in order to challenge the conviction and sentence by claiming, in reliance on Article 36 (1), that the competent authorities failed to comply with their obligations to provide the requisite consular information.

Courts must conduct such a review even if their procedural rules, such as those relating to default of claims, would otherwise preclude review. These propositions have been

affirmed by the International Court of Justice (ICJ).[4] Furthermore, the right to consular access is a right protected under customary international law and must therefore be observed.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS IS A KEY FORM OF PROTECTION FOR FOREIGN NATIONALS

The VCCR, a product of the Conference on Consular Relations convened by the United Nations General Assembly in 1963, is a global multilateral treaty that governs consular relations and regulates many aspects of the relationship of foreign consuls to a host Government. The VCCR has been ratified by 168 States (including the United States on November 24, 1969) and is the cornerstone of international consular relations.[5] Its conclusion is regarded as "the single most important event in the history of the consular institution. Indeed, after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaty or national legislation, without reference or recourse to the Vienna Convention".[6]

The Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement

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[4] *LaGrand (F.R.G. v. U.S)*, 2001 I.C.J 104 (Jun. 27); *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

[5] United Nations, *Multilateral Treaties Deposited with the Secretary-General, Vienna Convention on Consular Relations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty31.asp.

[6] LUKE LEE, CONSULAR LAW AND PRACTICE at 26 (2d. ed. 1991).

of Disputes (Optional Protocol) provides that disputes "arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".[7]

The ICJ is "the principal judicial organ of the United Nations" (U.N.).[8] The Court's statute is annexed to the U.N. Charter; therefore, States which become members of the United Nations also become parties to the Statute.[9]

The United States[10] and Member States of the EU are party to the United Nations Charter. Respect for ICJ judgments by States that are party to litigation is a basic principle of the international legal order as articulated in the United Nations Charter, Article 94: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

Article 36 recognizes the rights of consuls to communicate with and assist their nationals. Article 36 also confers specific rights on detained or imprisoned foreign nationals. As the United States Government has noted before the International Court of Justice, Article 36 "establishes rights not only for the consular officer, but perhaps more importantly for the nationals of the Sending State who are

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[7] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, *opened for signature* Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 261.

[8] U.N. Charter, *opened for signature* June 26, 1945, 59 Stat. 1031, T.S. No. 993, Article 92; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993.

[9] U.N. Charter, Article 93, para.1.

[10] The United States ratified the U.N. Charter on August 8, 1945. United Nations, *Multilateral Treaties Deposited with the Secretary General, Charter of the United Nations, at,* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp

assured access to consular officers and through them to others."[11]

Article 36 requires a Receiving State to inform detained foreign nationals of their right to communicate with their consulate and to facilitate access between detained foreign nationals and consuls of the Sending State. In addition, Article 36 confers specific State rights, recognizing the right of consuls to have access to, communicate with, and assist their detained national. Further, it establishes an obligation upon the Receiving State under paragraph 1 (c) of Article 36 to enable the consular officers to arrange for legal representation of their nationals.

The significance of consular access has been expounded upon by the Inter-American Court of Human Rights (IACtHR). The IACtHR stated that "notification of the right to communicate with a consular official of his country will materially improve his possibilities of a defense," and "procedural measures, including those taken by the police, will be done with greater concern for legality and greater respect for the dignity of the person."[12] The IACtHR stated that the right to be informed of the right to consular access "is a means of defense for the accused that is reflected, on occasion in a determinative way, in the respect shown for his other procedural rights".[13]

EU Member States consider consular access to be of critical importance. A foreign national faces unique disadvantages when left to navigate the foreign country's legal system in

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[11] U.S. Diplomatic and Consular Staff in Tehran (*USA v. Iran*), ICJ Pleadings, at 174.

[12] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, para. 121, Advisory Opinion OC-16/99, Inter-American Court of Human Rights (1999).

[13] *Id.* para 123.

the absence of support from his home nation, even if he is represented by competent legal counsel. Article 36 reflects agreement among the States parties that foreign nationals require special assistance when they are detained on a criminal charge.

Participation by a consul provides greater assurance that a Sending State's national will understand the rights afforded by the law of the Receiving State, and correspondingly that the proceedings will be conducted as intended under the law of the Receiving State.

In a particular case, a consul may be able to assure that the accused is represented by a competent attorney who possesses a cultural understanding of the national's specific circumstances and background. Consuls may also be able to acquaint their nationals with the basic procedures under the local legal system.

Accurate translation may also be of importance. A consul may be able to assist in securing expert translation, the result of which could provide both an effective understanding by the national of his legal rights and the assurance for the arresting authority of a thorough and accurate comprehension of the national's statements.

A consul may assist in locating witnesses or documentary evidence available in the Sending State. The information thus gained may be critical in a determination of guilt, and, in the event of a conviction, in the assignment of an appropriate sentence.

II. ARTICLE 36 PROVIDES JUDICIALLY ENFORCEABLE RIGHTS

This Court has provisionally accepted in *Breard v. Greene*[14] that the VCCR confers on a foreign national a right to consular assistance following arrest. The ICJ in *LaGrand (F.R.G. v. U.S.)*, stated that Article 36 provides a right invocable by the foreign national. Article 36 provides, in part: "The said authorities shall inform the person concerned without delay of his rights under this subparagraph." The ICJ confirmed that Article 36 creates a right for a foreign national both because of this plain language, and "[m]oreover, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised 'if he expressly opposed such action.' The clarity of these provisions, viewed in their context, admits of no doubt."[15]

III. JUDICIAL REVIEW OF CONVICTION AND SENTENCE IS REQUIRED IF ARTICLE 36 IS VIOLATED

If a foreign national is convicted absent compliance with the notification obligation of Article 36, the rights of both the Sending State and the foreign national are implicated, and the conviction must be reviewed. Article 36 provides in a second paragraph: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full

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[14] *Breard v. Greene*, 523 U.S. 371, 376 (1998).

[15] *LaGrand (F.R.G. v U.S.)*, 2001 I.C.J. 104 (Jun. 27), para 77.

effect to be given to the purposes for which the rights accorded under this Article are intended".[16]

The ICJ has addressed required remedies, first in *LaGrand* in 2001, and more recently, on March 31, 2004, in *Avena and other Mexican Nationals.*[17] In Article 36, paragraph 2, the ICJ found an obligation to allow a foreign national to seek a remedy: "The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual".[18]

The ICJ held that where the notification obligation under Article 36 has not been observed, action on the criminal conviction is required: "if the United States . . . should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[19]

The ICJ subsequently affirmed in *Avena* the requirement for review and reconsideration of a breach of Article 36 rights. The Court considered "that it is the judicial process that is suited to this task".[20] Contrary to the argument of the US,

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[16] VCCR, Article 36, para. 2.
[17] *Avena and other Mexican Nationals (Mex. v. U.S.),* 2004 I.C.J. 128 (Mar. 31).
[18] LaGrand, para. 89.
[19] *Id.* para. 125.
[20] *Id.* para. 141.

the Court stated that consideration by way of executive clemency does not suffice in view of the fact that the clemency process, as currently practiced in the US, does not appear to meet the requirements and it is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration".[21]

IV. REVIEW MUST TAKE ACCOUNT OF THE VIOLATION

Review and reconsideration is required even absent a showing that a different result would have been achieved had a consul intervened. As indicated above, a consul may act in a variety of ways in a particular case. After a person has been convicted without being informed of the right of consular access, it may be impossible to determine what impact a consul might have had on the proceedings.

Article 36, by requiring consular access, presumes that it will help a foreign national. The ICJ stated in *Avena*, "The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention".[22]

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[21] *Avena*, para. 143.
[22] *Avena* para. 122.

V. RULES ON DEFAULT MAY NOT BE APPLIED

The ICJ ruled that treaty obligations require that rights be enforced at whatever point in time it remains possible to do so, regardless of rules on procedural default. "The problem arises," the ICJ stated, "when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information 'without delay,' thus preventing the person from seeking and obtaining consular assistance from the Sending State".[23] The ICJ concluded on the facts of the *LaGrand* case, "Under these circumstances, the procedural default rule had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violated paragraph 2 of Article 36".[24]

Expanding upon this position, the ICJ in *Avena* asserted that "[t]he crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution".[25]

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[23] *LaGrand*, para. 90.
[24] *Id.* para. 91.
[25] *Avena*, para. 134.

VI. CONSULAR ACCESS IS A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW

The rights of a foreign national as provided in Article 36 are part of the corpus of customary international law. Indeed, the United States accepts that consular access is required by a customary norm and it "looks to customary international law as a basis for insisting upon adherence to the right of consular notification, even in the case of countries not party to the VCCR or any relevant bilateral agreement." Consular notification is, in the view of the United States, "a universally accepted, basic obligation..."[26]

In addition to the widespread ratification of the VCCR, the customary character of the consular access right is evidenced by its inclusion in other international instruments. International norms and standards adopted by international bodies and organizations, including the United Nations, further reflect acceptance of the necessity for full respect and observance of the right to consular access.

While the VCCR is the foundational treaty that regulates consular relations, additional treaties, including a number ratified by the United States, incorporate the principle. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires States to punish those who commit torture. A torture suspect who is a foreign national "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". [27]

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[26] DEPARTMENT OF STATE, CONSULAR NOTIFICATION AND ACCESS, at 44 (1998).

[27] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 6 (3), G.A. Res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

Furthermore, a foreign national charged with a crime against a diplomat is entitled, by virtue of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, to consular access.[28]

Since 2000, the Organization of American States General Assembly has also enshrined these principles in the resolution on *The Human Rights Of All Migrant Workers And Their Families.*[29]

Various U.N. bodies have further confirmed this fundamental principle. The U.N. General Assembly has affirmed the right to consular access in a number of resolutions. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that a foreign national is entitled to consular access, and to be informed of that right.[30] In addition, the Declaration on the Human Rights of Individuals Who Are

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[28] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Article 6, 28 U.S. Treaties 1977 (1973).

[29] *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1717 (XXX-O/00) (Resolution adopted at the first plenary session, held on June 5, 2000); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1775 (XXXI-O/01) (Resolution adopted at the third plenary session, held on June 5, 2001); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1898 (XXXII-O/02) (Resolution adopted at the fourth plenary session held on June 4, 2002); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 1928 (XXXIII-O/03), (Resolution adopted at the fourth plenary session, held on June 10, 2003); *The Human Rights Of All Migrant Workers And Their Families,* AG/RES. 2027 (XXXIV-O/04), (Resolution adopted at the fourth plenary session, held on June 8, 2004).

[30] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16, U.N. General Assembly Resolution 43/173 (1988).

Not Nationals of the Country in Which They Live views consular access as a right in the event of a detention.[31]

The U.N. General Assembly has "reaffirm[ed] emphatically the duty of States parties to the Vienna Convention on Consular Relations of 1963 to ensure full respect for and observance of the Convention, in particular with regard to the right of foreign nationals, regardless of their immigration status, to communicate with a consular official of their own State in the case of detention, and the obligation of the State in whose territory the detention occurs to inform the foreign national of that right".[32]

Both the U.N. Rules for the Protection of Juveniles Deprived of their Liberty[33] and the U.N. Standard Minimum Rules for the Treatment of Prisoners[34] provide that if a foreign national is arrested, the right of consular access must be respected.

VII. CONCLUSION

The EU considers the implementation of the right of consular access to be of utmost importance to members of the international community. Article 36, as construed by the ICJ, requires the review and reconsideration of the conviction and sentence in the present cases. When notification is omitted

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[31] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, Article 10, U.N. General Assembly Resolution 40/144 (1985).

[32] Protection of Migrants, U.N. General Assembly Resolution, A/RES/58/190 (Mar. 22, 2004), para. 10.

[33] G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990).

[34] Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957).

and a criminal conviction ensues, courts must provide a remedy. As the ICJ stated in *Avena*, "the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals' cases by the United States courts."[35]

In light of the international law norms articulated above, the EU, Liechtenstein, Norway and Switzerland respectfully support the position of Petitioners.

Respectfully Submitted,

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[35] *Avena*, para. 121.

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In The
Supreme Court of the United States

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF FORMER UNITED STATES DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS MARIO A. BUSTILLO AND MOISES SANCHEZ-LLAMAS

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STATEMENT OF INTEREST[1]

Amici have served as Senior State Department Officials, Ambassadors, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[2] *Amici* express no opinion on what the ultimate resolution of Petitioners' convictions and sentences should be. Nor do all signatories of this brief necessarily agree with the International Court of Justice's ("ICJ") interpretation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("VCCR"), in *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 128 (Mar. 31) ("*Avena*"). But all *Amici* do agree that this Court should abide by the ICJ's interpretation of Article 36 of the VCCR as a matter of comity and uniform treaty interpretation, rather than allowing individual state courts within the United States to adopt their own independent interpretations of the meaning of Article 36. All *Amici* further agree that this Court's failure to respect the ICJ's judgment in

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[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no party, person or entity other than *Amici* and their counsel authored this Brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this Brief. All parties have granted consent to the filing of this *Amicus Curiae* Brief.

[2] *Amici* include former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former Ambassadors Morton Abramowitz, Stephen W. Bosworth, Jeffrey Davidow, Wendy R. Sherman, Nancy Soderberg, and Frank G. Wisner, former Legal Adviser Herbert J. Hansell, and Special Presidential Envoy James C. O'Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. *Amici* appear in their personal capacities, and by doing so, do not intend to convey the views of their affiliated institutions on the questions presented here. The qualifications of *Amici* are listed in the Appendix to this Brief.

Avena with respect to the two cases currently before the Court would significantly impair the credibility and efficacy of American diplomats in the international arena, jeopardize important U.S. foreign policy interests, and diminish American standing in the world community. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 385 (2000) ("[O]pinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by [a] state Act.").

Amici believe that "[g]reat nations, like great men [and women], should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court therefore should enforce *Avena*'s holdings that: (1) Article 36 of the VCCR provides foreign nationals with judicially enforceable individual rights; and (2) U.S. state and federal courts must afford those individual rights "full effect," notwithstanding the existence of any state procedural bar. To protect the foreign policy interests of the United States, this Court's judgment should ensure that state court rulings do not undermine our diplomatic relations with close allies or damage critical U.S. interests embodied in other treaty regimes.

SUMMARY OF ARGUMENT

From the founding until today, the ability of U.S. diplomats to carry out important foreign policy objectives has critically depended upon strong enforcement of our treaty obligations by the federal government and federal courts. The Framers' difficult experiences under the Articles of Confederation taught them that the United States cannot credibly conduct its foreign relations unless the several States honor national treaty obligations. Under the Articles of Confederation, state violations of national treaty obligations led important allies and adversaries to refuse both to honor their reciprocal treaty obligations and to enter new commercial treaties with the United States.

In drafting the Constitution, the Framers made sure that the federal government would have the authority to bind the entire nation, including the individual States, to our international obligations. Since its inception, this Court repeatedly has reaffirmed that understanding, regularly holding that treaties duly entered by the national government supersede conflicting state laws and bind the States to our national commitments.

The ICJ has interpreted the VCCR as creating judicially enforceable individual rights to consular access and notification, which must be given "full effect" over any state procedural bar. The President has issued an order confirming that the United States has an obligation to comply with its international commitments and to enforce the ICJ's decision in *Avena*. Notwithstanding this clear interpretation of the scope of Article 36 of the VCCR, the Commonwealth of Virginia and the State of Oregon arrested, tried, convicted, and sentenced Petitioners Mario A. Bustillo and Moises Sanchez-Llamas – Honduran and Mexican nationals, respectively – without ever informing either of his right to seek consular assistance.

Oregon's and Virginia's continuing noncompliance in these cases with the VCCR – as construed by the *Avena* court – offends the Framers' constitutional vision and promotes precisely the sort of diplomatic failures that prompted the modern treaty power. The several States' practice of ignoring the VCCR obligations has strained bilateral and multilateral relations, disrupted important national foreign policy interests, and impaired the ability of diplomats to carry out critical initiatives with foreign governments and international organizations.[3] Moreover, state noncompliance with our treaty obligations has caused allies and adversaries alike to criticize the United

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[3] *Accord Medellin v. Dretke*, 125 S. Ct. 2088, 2096 (2005) ("In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem. . . . [that] may have considerable ramifications . . . .") (O'Connor, J., dissenting) (citations omitted).

States and to question our longstanding leadership in international law and human rights.

This Court's decision will affect not just the ability of the United States to enforce the VCCR, but, more broadly, our nation's capacity to participate effectively in a diverse array of treaty regimes in which our executive and legislative branches of government have chosen compulsory international adjudication as a means to protect our national interests. As American diplomats, *Amici* have helped to pursue and secure numerous treaties that confer jurisdiction upon the ICJ and other international dispute-settlement bodies. As American private commercial interests become increasingly global, reliable mechanisms for international dispute resolution will become increasingly central to our nation's foreign policy. The United States cannot build or benefit from these mechanisms so long as States and localities continue to flout international tribunal rulings, break ratified treaties, and jeopardize our global reputation as a dependable treaty partner.

ARGUMENT

I. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Specific Holdings Construing Article 36 of the VCCR.

Article 36 of the VCCR requires all signatory nations, including the United States, to inform "without delay" any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform "without delay" the consular office of that national's detention or arrest. Since 2001, the United States has been a party before the ICJ to three cases interpreting the scope of Article 36 of the VCCR.

First, in *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Provisional Measures Order of Apr. 9), the ICJ indicated provisional measures questioning Virginia's violations of a Paraguayan national's

Article 36 rights. Considering that ICJ ruling in *Breard v. Greene*, 523 U.S. 371, 375 (1998), this Court found absent from the ICJ's ruling any "clear and express statement" of the meaning of Article 36 with respect to the issues currently before this Court.

Three years later, however, in *LaGrand Case* (*F.R.G. v. U.S.*), 2001 I.C.J. 466 (June 27) ("*LaGrand*"), the ICJ rejected the U.S. position that rights stemming from violations of the VCCR are solely the "rights of States, and not of individuals." *Id.* ¶ 76. The ICJ specifically held that Article 36 of the VCCR "creates individual rights." *Id.* ¶ 77. Moreover, the ICJ determined that application of procedural default rules in that case violated the VCCR because it prevented "'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" *Id.* ¶ 91 (quoting VCCR art. 36(2), 21 U.S.T. at 101) (alteration in original).

In 2004, in *Avena*, the ICJ held that the United States had violated the consular rights of numerous Mexican nationals in contravention of Article 36(1)(b) of the VCCR by failing to inform fifty-one detained Mexican nationals of their treaty rights and by failing to inform Mexican consular authorities of forty-nine of the detentions. *Id.* ¶ 153(4)-(5).[4] Citing *LaGrand*, the ICJ reaffirmed that Article 36(1)(b) of the VCCR gives detained foreign nationals judicially enforceable individual rights they can "assert[] ... within the domestic legal system of the United States." *Id.* ¶ 40. The ICJ also held that domestic application of procedural default rules to bar consideration of VCCR claims violated Article 36(2)'s direction that signatories "enable full effect to be given to the purposes

[4] The ICJ held that the proper remedy for these violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals ... by taking account ... both of the violation of the rights set forth in Article 36 ... and of paragraphs 138 to 141 of this Judgment." *Avena* at ¶ 153(9).

for which the rights accorded under this Article are intended." VCCR art. 36(2), 21 U.S.T. at 101; *Avena* at ¶¶ 113-14.

Together, *LaGrand* and *Avena* present clear pronouncements by the ICJ that Article 36 of the VCCR provides individual, judicially enforceable rights that cannot be impeded by local procedural bars.[5] The ICJ's unambiguous interpretation of Article 36 in *LaGrand* and *Avena* binds this Court not just as a matter of international law,[6] but also through principles of comity and uniform treaty interpretation. As this Court has explained:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). At least as much "mutual trust and respect" should be due the judgment of an international, U.N.-created tribunal that the United States has chosen as the forum for resolution of a certain category of disputes. *See* Sandra Day O'Connor, Federalism of Free Nations, *in International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

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[5] This interpretation of Article 36 is precisely the "clear and express statement" this Court had found lacking in *Breard*. 523 U.S. at 375.

[6] *See Avena* at ¶ 151 (interpretation of Article 36 of the VCCR is one of general application and is not limited to the facts of the case); *see also* 3 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, at 1655-56 (3d ed. 1997) (ICJ judgment "creates a res judicata").

By signing the Optional Protocol to the VCCR, the United States expressly consented to the ICJ's jurisdiction to interpret the meaning of the VCCR. The United States does not deny that the decision in *Avena* was reached by an impartial judicial body[7] or that the United States fully and fairly litigated the dispute. Given this background, rules of comity should require that the ICJ's judgment be given full effect in U.S. courts without reexamining the merits of that decision. *Cf. Hilton*, 159 U.S. at 202; *see id.* at 203 ("[T]he merits of the case should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion . . . that the judgment was erroneous in law or in fact."); *see also Medellin v. Dretke*, 125 S. Ct. 2088, 2094 (2005) (Ginsburg, J., concurring) ("It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a 'let's see if we agree' approach is out of order.").

This Court should adhere to the ICJ's interpretation of Article 36 of the VCCR to help ensure that the VCCR's provisions on consular access are consistently interpreted and uniformly applied by all signatories – one of the parties' principal goals in enacting the VCCR in the first place.[8] When a multilateral treaty results from an effort to achieve uniform treatment of a particular subject, "it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently." *Olympic Airways v. Husain*, 540 U.S. 644, 660

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[7] Indeed, in *Avena*, the ICJ's determination of liability was reached by a vote of 14-1 (with the U.S. judge in the majority), and its determination of remedy was reached by unanimous vote. *Avena* at ¶¶ 153(4)-(7), (9), (11).

[8] *See* Report of the U.S. Delegation to the U.N. Conference on Consular Relations, *reprinted in Vienna Convention on Consular Relations and Optional Protocol*, Sen. Exec. Rep. 91-9, 91st Cong., 1st Sess., at 3 (1969) (report of Sen. Fulbright) (stating that the U.S. entered into the VCCR to "further friendly relations between nations through the orderly development of uniform standards of consular practice").

(2004) (Scalia, J., dissenting).[9] The *Avena* court itself recognized the importance of this principle of uniform treaty interpretation, stating that it had approached the decision "from the viewpoint of the general application of the Vienna Convention" and intended its interpretation and application of the VCCR to apply in any future case between *any* parties to the VCCR. *See Avena* at ¶ 151. Both this principle of uniform treaty interpretation and the VCCR itself would be eviscerated were each national party (or local province thereof) to insist upon applying its own peculiar interpretation of the VCCR.

Recent U.S. Executive Branch positions reinforce *Amici*'s claim that principles of comity and uniform treaty interpretation warrant application of *Avena*'s interpretation of the VCCR. In his February 28, 2005 Presidential

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[9] *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537 (1995); *Air France v. Saks*, 470 U.S. 392, 404 (1985); *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 185 (1982) ("When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we [as judges] must, absent extraordinarily strong contrary evidence, defer to that interpretation."); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) ("A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible."); Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 Am. Soc'y Int'l L. Proc. 305, 305 (2004) ("When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories. Otherwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated."); A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer (Jan. 13, 2005) (transcript *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm (last visited Dec. 18, 2005)) ("[T]he object of a treaty being to come up with a text that is the same for all the countries, [the U.S. courts] should defer to the views of other signatories, much as we defer to the views of agencies—that is to say if it's within [the] ball park, if it's a reasonable interpretation, though not necessarily the very best.") (comments of Justice Scalia).

Determination directing state courts to comply with *Avena*, President Bush declared that "the United States will discharge its international obligations under [*Avena*] by having state courts give effect to the decision *in accordance with general principles of comity*."[10] Subsequently, the Executive Branch has submitted two *amicus* briefs explaining the reasoning behind this Presidential Determination.[11] These briefs make clear that the presidential decision to adhere to *Avena* as a matter of comity was not tied to the fact that the United States was an immediate party to the *Avena* decision.[12] Instead, the United States argues, as *Amici* do here, that state compliance with *Avena* is essential for broader diplomatic reasons: because compliance "protect[s] the interests of United States citizens abroad, promotes the effective conduct of foreign

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[10] Brief for the United States as *Amicus Curiae* Supporting Respondent at app. 2, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (Memorandum from the President to the Attorney General (Feb. 28, 2005)), 2005 WL 504490, at *1aa (emphasis added).

[11] *See* Brief for the United States as *Amicus Curiae* Supporting Respondent, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928), 2005 WL 504490; Brief for the United States as *Amicus Curiae*, *Ex Parte Jose Ernesto Medellin*, No. AP-75,207 (Tex. Crim. App. Jun. 22, 2005), *available at* http://www.debevoise.com/publications/pdf/CCA%20US%20Amicus.pdf (last visited Dec. 18, 2005) [hereinafter U.S. CCA Brief].

[12] To the contrary, the United States claims that "[i]n particular circumstances, the President may decide that the United States will not comply with an ICJ decision and, if Security Council enforcement measures are proposed, direct a veto, consistent with the United Nations Charter." U.S. CCA Brief at 21; *see also id.* at n.3 (citing the United States' failure to abide by the ICJ's determination in *Military and Paramilitary Activities* (*Nicar. v. U.S.*), 1986 I.C.J. 14, 146, (June 27)). The U.S. Government's brief gives little weight to the fact that the United States was a party to the VCCR's Optional Protocol when *Avena* was decided because "[t]he Optional Protocol does not itself commit the United States to comply with a resulting ICJ decision." *Id.* at 17. If so, it is unclear why the U.S. decision to *withdraw* from the Optional Protocol on March 7, 2005 should affect the question whether compliance with *Avena* remains necessary as a matter of comity. *Id.* at 17 n.1.

relations, and underscores the United States' commitment in the international community to the rule of law." U.S. CCA Brief, *supra* note 11, at 13; *see also id.* at 23 (explaining the President's decision to adhere to *Avena* as the product of "delicate and complex calculations . . . taking into account" a number of factors, including "the need for the United States to be able to protect Americans abroad, the international legal obligations of the United States, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests").[13]

Against this background, the refusal of state courts to adhere to *Avena* will undermine America's credibility as a global leader and seriously hinder foreign policy objectives at a critical time in our nation's history. The United States has long declared that the right to consular access guaranteed by the VCCR is "widely accepted as the standard of international practice of civilized nations."[14] Through its diplomats, our government routinely calls on such nations as Iraq, Syria, China, and North Korea to abide by this minimal standard when U.S. citizens are detained abroad.[15]

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[13] Significantly, the U.S. Government brief also asserts that applying the "review and reconsideration" of VCCR claims as set forth in *Avena* will be easy for state courts to accomplish. *See id.* at 29.

[14] Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 385 (1997) (quoting telegram sent from U.S. Department of State to its Embassy in Damascus on February 21, 1975 [hereinafter Damascus Telegram], *as reprinted in* Luke T. Lee, *Consular Law and Practice* 145-46 (2d ed. 1991)).

[15] S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Aecess to a Consul*, 26 St. Mary's L.J. 719, 729 (1995) (noting U.S. protest of delay in notification of detention of U.S. missionaries in El Salvador); Transcript of State Dep't Regular Briefing, Fed. News Serv., Aug. 19, 1999 (James Rubin, State Dep't spokesman, reporting on request for access and immediate grant of access to U.S. citizen detained in China); Associated Press, *Iraqis Refuse Access to Americans for Second Day*, Apr. 19, 1995 (quoting State Department

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The United States not only drafted the amendment that ultimately became Article 36, but also led the effort to convince nations throughout the world to confer compulsory jurisdiction on the ICJ, precisely because American foreign policy officials realized that diplomatic overtures alone were insufficient to enforce the VCCR.[16] Over two decades ago, when Iran famously violated the VCCR by taking U.S. diplomats hostage in Tehran, then flouted its obligation under the Optional Protocol to comply with the ICJ's order to release the hostages, then-President Carter accused Iran of showing " 'contempt, not only for international law, but for the entire international structure for

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spokesman: "Obviously, we are extremely disappointed that the Iraqi government has reneged on its promise to allow these weekly visits. We're disappointed because that is their legal obligation under the Vienna Convention."); Transcript of State Dep't Regular Briefing, Fed. News Serv., July 15, 1999 (James Rubin, State Dep't spokesman, commenting on detention of U.S. female citizen: "We remind the government of North Korea of its obligations under the Interim Consular Agreement of 1994 and the Vienna Convention on Consular Relations to permit consular access to detained U.S. citizens."); *see also* Lee, *supra* note 14, at 145-46 (documenting U.S. invocation of the VCCR); Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioner Jose Ernesto Medellin at 17 & n.26, *Ex Parte Jose Ernesto Medellin*, No. AP-75,207 (Tex. Crim. App. Jun. 22, 2005) [hereinafter Diplomats CCA Brief], *available at* http://www.debevoise.com/publications/pdf/BriefAmiciCuriaeofFormerUSDiplomats.pdf (last visited Dec. 18, 2005).

[16] *See* Brief for Ambassador L. Bruce Laingen and Lt. Col. John J. Swift et al. as *Amici Curiae* Supporting Petitioners at 6-16, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928); Brief for International Law Experts as *Amici Curiae* Supporting Petitioners at 11-13, 15-21, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (describing the U.S. role in the creation and implementation of the VCCR); Luke T. Lee, *Vienna Convention on Consular Relations* 111, 113 (1966); *see also* Sen. Exec. Rep. 91-9, at 19 (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration of the State Dep't); U.N. Conference on Consular Relations, Mar. 4–Apr. 22, 1963, *Official Records*, 1st Comm., 29th mtg., ¶¶ 36, 54, U.N. Doc A/CONF.25/16 (1963); *id.* at plenary mtg., 21st mtg., ¶¶ 17-20.

securing the peaceful resolution of differences among nations.'"[17]

Today, our closest allies now accuse the United States of showing similar disregard for the VCCR and the ICJ. Through numerous calls, meetings, and letters to both state and federal authorities, our allies have strenuously requested review and reconsideration of the convictions and sentences of their citizens who were denied their VCCR rights despite orders of the ICJ.[18] There are few, if any, areas of our foreign policy in which *Amici* can recall hearing so consistently from foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations.

International and regional human rights bodies have echoed the vigorous protests of foreign governments. The Inter-American Commission on Human Rights, the European Parliament, and the U.N. High Commissioner for Human Rights have each strongly criticized U.S. violations

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[17] Philippe Sands, *An Execution Heard Around the World*, L.A. Times, Apr. 16, 1998, at B9 (quoting President Carter's comments during the Iranian hostage crisis).

[18] *See, e.g.*, Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Laura LaFay, *World Court – U.S. To Halt Execution*, Virginian-Pilot, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italian government to execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. Times, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General); David Schwartz, *Plan To Execute German Killers Attracts Scrutiny*, Dallas Morning News, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog requesting support for clemency from President Clinton and Arizona Governor Hull); *see also* Rodrigo Labardini, *International Court of Justice Finds U.S. Breached Its Obligations Under the Vienna Convention on Consular Relations*, 20 Int'l Enforcement L. Rep. 250, 251 n.8 (June 2004) (documenting six letters sent by the government of Mexico to the United States regarding the execution of Irineo Tristan Montoya by Texas in 1997); Diplomats CCA Brief at 18 & n.29.

of the VCCR.[19] The European Union has lodged numerous official demarches with state authorities requesting reconsideration of pending executions because of violations of the VCCR.[20]

The widespread international opposition to the several States' persistent practice of violating the VCCR and the ICJ decisions construing that treaty has undeniably harmed our global position as a human rights leader.[21]

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[19] *See, e.g.*, *Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69-70 (2002) (describing notification of the right to consular assistance as "among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial" and stating that failure to notify of such rights violated Mexican national's right to due process); *Resolution on Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify foreign nationals of rights to consular access and noting "demonstrably extremely poor quality" of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, Wash. Post, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because of the denial of his rights under the VCCR by the state of Texas); Dana Priest & John M. Goshko, *Genocide Warning Center Established; Clinton Human Rights Initiatives Include Changes at INS*, Wash. Post, Dec. 11, 1998, at A52 (referring to a speech by U.N. High Commissioner for Human Rights before U.N. General Assembly, criticizing the execution of Joseph Stanley Faulder, a Canadian citizen, because of the denial of his rights under the VCCR by the state of Texas); Diplomats CCA Brief at 19-20 & n.32.

[20] Demarches by the European Union have been filed in a number of cases, including: (1) Joseph Stanley Faulder, Canada, Dec. 8, 1998; (2) Miguel Angel Flores, Mexico, Nov. 3, 2000; (3) Hung Thanh Le, Vietnam, Dec. 4, 2003; (4) Gregory Madej, Poland, May 1, 2001; (5) Javier Suarez Medina, Mexico, July 23, 2002; (6) Osvaldo Torres, Mexico, Apr. 30 and May 6, 2004; (7) Gerardo Valdez Maltos, Mexico, June 5 and July 13, 2001.

[21] *See, e.g.*, George Boehmer, *Killer Loses Fight for Life*, Daily Tel. (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German parliament's Human Rights Committee Chairman Roth's reaction to the

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State noncompliance with these rulings has undermined our authority in several important international human rights bodies.[22] International disapproval of our noncompliance with the VCCR has also deflected attention away from serious human rights abuses in other countries. Actions of the several States in violation of the VCCR and the ICJ decisions construing that treaty have provided our adversaries with diplomatic ammunition to challenge the sincerity of our own commitment to human rights and the rule of law in international relations.[23] As the German

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LaGrand execution: "When [Secretary of State Madeleine] Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously."); Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, *at* http://web.amnesty.org/library/Index/engAMR51027 1998 (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: "[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights.") (last visited Dec. 21, 2005); Diplomats CCA Brief at 19-20 & n.34.

[22] Shortly after the LaGrand executions occurred despite a contrary ICJ provisional measures order, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body's 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1. Shortly thereafter, the United States likewise failed to win a seat on the Inter-American Commission on Human Rights for the first time since that body's inception in 1959, and its observer status in the Council of Europe – which bans executions – has been put in jeopardy, in part because of U.S. executions of foreign nationals who had not been counseled under the VCCR. Connie de la Vega, *Going It Alone*, Am. Prospect, July 2004, at A22.

[23] *See, e.g.*, Raymond Bonner, *Mexican Killer Is Refused Clemency by Oklahoma*, N.Y. Times, July 21, 2001, at A8 (quoting Mexican government as declaring Oklahoma's execution of Mexican national denied VCCR rights as "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. Times, Mar. 5, 1999, at 14 (quoting German Justice Minister, declaring that Arizona's execution of the two LaGrand brothers "is barbaric and unworthy of a [nation] based on the

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Justice Minister stated in announcing Germany's suit against the United States in the ICJ to challenge the execution of two German nationals who were denied consular rights: "Respecting international laws cannot be a one-way street."[24] So long as the United States continues to promote the rule of law around the world, other nations will equally demand that we set an example by complying strictly with our own binding obligations under the U.N. Charter, the ICJ statute, and the VCCR.

Taken together, continued state noncompliance with our obligations under the VCCR has significantly hampered the ability of the President, *Amici*, and other diplomats to carry out foreign policy initiatives. In *Amici*'s experience, a significant proportion of important bilateral and multilateral meetings with our closest allies is now consumed with answering diplomatic demarches challenging these practices, rather than addressing issues more central to our core national foreign policy interests.

Allowing state courts to keep ignoring the ICJ's interpretation of Article 36 in *Avena* and *LaGrand* would inevitably harm our diplomatic relations with our closest allies. Foreign hostility stirred by the U.S. practice of executing foreign nationals who were denied their VCCR rights has triggered fierce press criticism and even angry demonstrations in front of U.S. embassies abroad.[25] Such

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rule of law"); David Stout, *Do As We Say, Not As We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. Times, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the VCCR: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts.").

[24] *See Germany Sues U.S. for Breaking Law*, Reuters, Sept. 16, 1999, *available at* http://www.ub.es/penal/historia/PdeM/dpicintl.html (last visited Dec. 19, 2005).

[25] *See* Brian Knowlton, *Execution Pits Mexico Against U.S.*; *Fox Echoes World on Death Penalty*, Int'l Herald Trib., Aug. 16, 2002, at 1 (documenting intense media attention in Mexico); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set To Die Today for 1975*

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protests have seriously disrupted important diplomatic missions, and at times, even threatened the physical safety of U.S. diplomats and embassy staff trying to work in these countries.[26]

Killing, Boston Globe, Dec. 10, 1998, at A2 (describing the execution of Stanley Faulder as a "cause celebre . . . dominating front pages and television newscasts" in Canada); Stout, *supra* note 23 (citing protest in front of U.S. embassy in Paraguay); *Paraguay Angered by US Execution*, BBC News, Apr. 15, 1998, *available at* http://news.bbc.co.uk/1/hi/world/americas/78602.stm (last visited Dec. 21, 2005) (documenting public outcry and inundation of radio channels in Paraguay with angry calls); Adam E. Jacobs & Mark A. Berman, *Rediscovering the Right to Consul*, N.J. L.J., Mar. 2, 1998, at 32 (describing demonstration in front of U.S. Consulate in Ecuador); *Texas Executes a Mexican Killer, Raising a Furor Across the Border*, N.Y. Times, Mar. 26, 1993, at A15 (describing protests). After Arizona executed Jose Roberto Villafuerte, a Honduran national, 500 Hondurans protested at the U.S. Embassy in Tegucigalpa, and Honduran newspapers reported retaliatory threats against the lives of U.S. citizens in Honduran prisons. *Nicaragua Solidarity Network of Greater New York, Hondurans Protest Execution in U.S.*, Weekly News Update on the Americas, Apr. 26, 1998, *available at* http://www.tulane.edu/~libweb/RESTRICTED/WEEKLY/1998_0426.txt (last visited Dec. 21, 2005). In 1999, to protest the execution of a Canadian who had been denied his rights under the VCCR, local activists planned demonstrations and other organized protests, including letter-writing campaigns and threatened economic boycotts. *U.N. Official Frets over Canadian's Texas Execution; Ottawa Steps Up Bid To Spare Albertan Convicted of Murder*, Toronto Star, Nov. 26, 1998, at A9; *Texas Embroiled in International Legal Rights Dispute Over Preparations To Execute a Canadian Citizen* (NPR Morning Edition broadcast, Dec. 9, 1998); Diplomats CCA Brief at 22 & n.31.

[26] During public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4000 U.S. personnel, including diplomatic staff, had to be protected by armed security. *See U.S. Boosts Security in Honduras As Tempers Flare*, Reuters, Apr. 24, 1998; Stout, *supra* note 23. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the VCCR, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, Hous. Chron., Sept. 28, 1997, at A1.

As U.S. diplomats, *Amici* have sought fully to discharge U.S. responsibilities under the VCCR to encourage the fullest reciprocal protection for American citizens who are detained while living or traveling abroad.[27] For the same reason, for more than half a century, the United States has vigorously protected its right of consular access to American citizens held abroad through the ICJ.[28] To protect our own nationals, the United States expects to gain consular access within seventy-two hours for any and all U.S. citizens and diplomats who are taken into foreign custody. U.S. Department of State, Consular Notification and Access, Part 3: FAQs, *available at* http://travel.state.gov/law/consular/consular_748.html (last visited Dec. 19, 2005). It would be all too easy for foreign governments to ignore those requests if U.S. courts could simply refuse to respect the VCCR at home, in the face of a directly applicable treaty interpretation rendered by the ICJ.

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[27] In a 1975 telegram to the Syrian Embassy, the State Department confirmed that the United States's willingness to provide consular access to foreign nationals rests in good measure upon expectations of reciprocity from our treaty partners. *See* Damascus Telegram, *as reprinted in* Lee, *supra* note 14 ("The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.").

[28] As early as 1954, the United States sought to bring suit in the ICJ against Hungary, challenging Hungary's failure to provide consular access before trial to four U.S. airmen whose plane had been shot down. *See Treatment in Hungary of Aircraft and Crew of the United States of America* (*U.S. v. Hung.*), 1954 ICJ Pleadings 19-20, 31, 35-36. The suit was eventually dismissed for lack of jurisdiction over Hungary, which had not yet signed the Optional Protocol. 1954 ICJ 99 (July 12); *see also Case Concerning United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*), 1980 I.C.J. 3 (May 24).

II. State Courts Disrupt the Diplomatic Interests of the United States When They Ignore the ICJ's Rulings That Article 36 of the VCCR Creates Judicially Enforceable Individual Rights That Must Be Given Full Effect Despite Local Procedural Bars.

A. The ICJ's Ruling Regarding Enforceable Rights Benefits U.S. Diplomatic Interests by Promoting Stricter Enforcement of the VCCR.

The ICJ has repeatedly and explicitly held that the VCCR creates a judicially enforceable individual right.[29] In so holding, the ICJ specifically rejected claims by the United States that the rights in question are somehow rights of States and not individuals. In *LaGrand*, for example, the ICJ carefully read the text, history, negotiations, and practical construction adopted by the parties to the VCCR to conclude "that [VCCR] Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person."[30]

Notwithstanding that declaration, the Oregon Supreme Court invoked a broad "presumption *against* the creation of individual, judicially enforceable rights" by means of treaties. *State v. Sanchez-Llamas*, 108 P.3d 573, 576 (Or. 2005). In fact, the VCCR gives rise to no such presumption. This Court has long recognized that self-executing treaties

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[29] *See supra* Part I; *see generally* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 Mich. J. Int'l L. 565, 596 (1997) (concluding from an examination of the travaux preparatoires of the VCCR that the general intent of the drafting parties in Article 36 was to create individual rights).

[30] *LaGrand*, at ¶ 77; *see also id.* ¶¶ 38, 42, 74, 78, 126; *Avena*, at ¶¶ 35, 40, 124, 139-40 (rejecting U.S. position that Article 36 rights are not individual rights).

may create judicially enforceable individual rights.[31] During the Senate hearings on the VCCR, the State Department advised the Senate that the "Convention is considered entirely self-executive and does not require any implementing or complementing legislation."[32] The ICJ rulings in *LaGrand* and *Avena* therefore define self-executing treaty obligations of the United States, which are the supreme law of the land under Article VI of the U.S. Constitution, and hence binding rules of decision to be applied by all state courts acting upon legal claims of the kind at issue here.[33]

Requiring the several States to recognize Petitioners' individual rights would plainly advance U.S. diplomatic interests. Ever-increasing numbers of Americans work and travel abroad each year, in an expanding array of foreign countries. As of 2004, over 160 countries were signatories to the VCCR.[34] State-to-state enforcement of the VCCR through the already overburdened diplomatic process necessarily provides only partial protection to American

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[31] *Cf. United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (if a treaty "is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation"); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 727, 734-35 (2004) (distinguishing rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty such as the VCCR).

[32] Sen. Exec. Rep. 91-9, at 5 (statement of J. Edward Lyerly, Deputy Legal Advisor for Administration of the State Dep't); *see also* Restatement (Third) of the Foreign Relations Law of the United States, Intro. Note preceding § 464 (3d ed. 1987).

[33] When ratification of the VCCR was pending, the Senate asked: "What is the effect of the convention on (a) Federal legislation; and (b) State laws?" The State Department answered, in relevant part: "To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions." Sen. Exec. Rep. No. 91-9, at 18.

[34] *See* Status of Multilateral Treaties Maintained by the U.N. Secretary General, *available at* http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIII/treatyb.asp (last visited Dec. 18, 2005).

citizens traveling abroad. The ICJ's construction of Article 36 of the VCCR to require judicially enforceable individual rights preserves diplomatic relations by enabling detained Americans to use private enforcement in lieu of, or as a supplement to, this overextended diplomatic process.

The high priority that the President has placed on defeating international terrorism and protecting national security requires governments and their respective intelligence agencies to cooperate closely through diplomatic channels. Yet when the several States refuse to respect our consular obligations, it is only a matter of time before those diplomatic relations become strained. Americans detained abroad are far less likely to receive their consular rights when the country detaining them can charge the United States with having failed to comply with its own diplomatic obligations.[35] For a state court to refuse to acknowledge that the VCCR provides a judicially enforceable individual right undermines the effective enforcement of the VCCR, and places even more pressure on overworked American diplomats.

It is for these reasons, among others, that other national courts – in Germany and Canada, for example – have accepted as binding the ICJ's interpretation that the VCCR creates judicially enforceable individual rights. Bundesgerichtshof [BGH] [Federal Court of Justice] Nov.

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[35] For example, in 1995, an American citizen, Harry Wu, was arrested in China, charged with espionage, and held incommunicado for over a week. U.S. State Department attempts to gain access to Mr. Wu were rebuffed by China on the pretext that, on at least two prior occasions, U.S. authorities had failed to comply with a minor provision of the U.S.-China Consular Convention far less important than VCCR Article 36 (the requirement that each party report the death of any foreign national to the deceased's consulate). *U.S. Says China Misled It on Scholar's Whereabouts; Envoy Says He Took 12-Hour Taxi Ride in Remote Region Based on Misinformation*, S.F. Examiner, July 4, 1995, at A12 (noting the Wu situation had harmed U.S.-China relations); Transcript of U.S. State Dep't Press Briefing, July 6, 1995, 1995 WL 407848, at *12-14 (F.D.C.H.) (State Dep't Spokesman Nicholas Burns).

7, 2001, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 116 (F.R.G.); *Regina v. Partak*, [2001] 160 C.C.C.3d 553, ¶¶ 25-26 (Ont. Super. Ct.) (Canada), *available at* 2001 CarswellOnt 4954 (Westlaw). Moreover, in its first encounter with this question, this Court acknowledged that the VCCR "arguably confers on an individual the right to consular assistance following arrest." *Breard*, 523 U.S. at 376. Following *Breard*, the lower courts have generally assumed, for the purposes of the cases before them, that a judicially enforceable individual right exists.[36] In erroneously rejecting the enforceability of Article 36 rights, the Oregon Supreme Court thus acted inconsistently not just with the binding and supreme law of the land, but also with the clear thrust of precedents of this Court and other lower courts.

B. The ICJ's Refusal To Recognize State Procedural Bars Benefits U.S. Diplomatic Interests.

In *Bustillo*, the Virginia court held that a state procedural default rule could be applied to foreclose a VCCR claim. But the VCCR is precisely the kind of treaty that the Framers had in mind when they chose to render treaties supreme over inconsistent state law. Virginia's and Oregon's noncompliance with the ICJ's ruling in *Avena* defies the authority of the federal government to bind the States to international obligations. Left unchecked, the persistent failures of Virginia, Oregon, and other States of the Union to comply with *Avena*'s interpretation of the

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[36] *See, e.g.*, *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999) ("In light of the language in Article 36 and the above cited authority, the Court finds that [defendants] have an individual right to consular notification under Article 36 which in turn grants them standing to object to a violation of that provision."); *State v. Lopez*, 633 N.W.2d 774, 783 (Iowa 2001) (collecting cases).

VCCR will inevitably alienate this nation from its closest allies.

The ability of the United States to present a credible diplomatic face to the world turns critically upon the national government's ability to make authoritative commitments to international agreements. For that reason, this Court repeatedly has recognized that "[n]o State can rewrite our foreign policy to conform to its own domestic policies." *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also id.* ("Power over external affairs is not shared by the states; it is vested in the national government exclusively."); *Crosby*, 530 U.S. at 377 ("Quite simply, if the [state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence."). Under the Articles of Confederation, the Continental Congress possessed the treaty power, but could not effectively enforce treaty obligations upon the States.[37] As a result, States were able to undermine agreements negotiated on behalf of the United States as a whole – leading to international skepticism of the fledgling United States as a dependable treaty partner.

In responding to the diplomatic paralysis resulting from the diverging state stances on foreign policy, the Framers specifically included treaties under the Supremacy Clause of the Constitution as part of the "Supreme Law of the Land," U.S. Const. art. VI, cl. 2. By so doing,

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[37] Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or impo.tation of any species of goods or commodities whatsoever." Articles of Confederation and Perpetual Union, art. IX. The Continental Congress, however, had no authority to regulate interstate or foreign commerce. *See id.* art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

the Framers sought to guarantee, in John Jay's words, that "treaties . . . will always be expounded in one sense and executed in the same manner – whereas adjudications on the same points and questions, in [the several] States, . . . will not always accord or be consistent."[38]

In *Avena*, the ICJ noted that nine States had violated Article 36(1) of the VCCR a total of fifty-one times by failing to provide detained Mexican nationals with their consular rights under the treaty. *See Avena* at ¶ 15. These violations have damaged relations between the United States and its closest allies.[39]

The ICJ consistently has ruled that the application of procedural default rules to prevent individuals from raising claims under Article 36(1) of the VCCR violates Article 36(2) of the VCCR, which requires states to give "full effect" to the consular rights enumerated in Article 36(1). This Court's failure to direct the several States to adhere to the ICJ's interpretation of Article 36 would allow those States to undermine the United States' diplomatic credibility and prevent the United States from speaking with one voice.

Allowing individual States to apply procedural bars to block the effective implementation of Article 36 rights

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[38] The Federalist No. 3, at 15 (John Jay) (Robert Scigliano ed., 2000).

[39] Officials of our nearest neighbors have openly declared that the failure of American state authorities to provide their nationals with timely consular access has "strain[ed]" bilateral relations. Raymond Bonner, *U.S. Bid To Execute Mexican Draws Fire*, N.Y. Times, Oct. 26, 2000, at A20 (quoting Jorge G. Castaneda, foreign policy advisor to Mexican President Fox). In 2002, even before the ICJ issued its final judgment in *Avena*, Mexican President Vicente Fox even took the extraordinary step of canceling a trip to President Bush's Texas ranch as " 'an unequivocal signal of rejection of the execution' " of a Mexican national who had not been informed of his consular rights. Knowlton, *supra* note 25, at 1 (quoting President Fox's representative); *see also* Nickerson, *supra* note 25, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen Stanley Faulder who had been denied consular rights).

would undermine the safety of Americans living and traveling abroad. There are currently at least twenty-five nations[40] – presiding over one-third of the world's population[41] – that have federal systems with diverse state laws, courts and procedures. If states and provinces in each of these countries could invoke local procedural bars to excuse noncompliance with the VCCR, as Virginia and Oregon have done here, the protections afforded by that treaty to detained American citizens would quickly become meaningless.

As diplomats, *Amici* have struggled to secure the States' cooperation in implementing VCCR obligations. In 1998, Secretary of State Madeleine Albright, a signatory to this Brief, wrote to the Governor of Virginia with regard to Angel Francisco Breard, a Paraguayan national for whom the ICJ granted a provisional measure directing the United States to stay his execution because Virginia officials had ignored his VCCR rights.[42] In requesting that the Governor exercise his powers to stay Breard's execution, Secretary Albright explained that she was "'particularly concerned about the possible negative consequences

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[40] Argentina, Australia, Austria, Belgium, Bosnia & Herzegovena, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Saint Kitts & Nevis, Serbia & Montenegro, South Africa, Spain, Switzerland, Russia, United Arab Emirates, United States, Venezuela. *See* U.S. Department of State, Country Background Notes, *available at* http://www.state.gov/r/pa/ei/bgn/ (last visited Dec. 19, 2005). Indeed, the recently formed Republic of Iraq may soon become the newest member of the community of federalist nations and is one country in which a large number of Americans are almost certain to be present in the near future.

[41] Objectives, Center for the Study of Federalism, Temple University, *at* http://www.temple.edu/federalism/objectives.html (last visited Dec. 18, 2005).

[42] Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 Am. J. Int'l L. 666, 671-72 (1998).

[of the execution] for the many U.S. citizens who live and travel abroad.'"[43] It is precisely to ensure that foreign provinces cannot claim a right to violate national obligations that the State Department has since taken such great pains to instruct state and local law enforcement officials on the issue of consular notification.

Failure to hold the several States accountable for U.S. obligations under international law would set a dangerous precedent. As the first country designed on federalist principles, the United States historically has served as a model for many other nations. Indeed, many of these nations are seeking to reconcile their international obligations with their federal structures and continue carefully to observe U.S. practices.[44] A government's capacity to ensure the reciprocity critical to international cooperation among nations is only as strong as the compliance that those national governments can obtain from their federated parts.[45] This Court should not allow the several

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[43] *Id.* "'The execution of Mr. Breard in the present circumstances,'" Secretary Albright observed, "'could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention'" and "'could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.'" *Id.*

[44] For example, Brazil recently passed a constitutional amendment that allows the Attorney General to "federalize" state court cases involving human rights violations. The relevant amendment states that this power shall be exercised in order to assure the fulfillment of obligations incurred by the Brazilian government through international human rights treaties. Emenda Constitucional No. 45, de 30 de dezembro de 2004, *available at* https://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm#art109 (last visited Dec. 19, 2005) (author's translation).

[45] In India, for example, the laws of five states on "religious conversion" have so affected the work of Christian missionaries that the State Department's Consular Information Sheet for India specifically warns Americans who wish to engage in missionary activities in these states to seek legal advice regarding the state legislation. *See* U.S.

(Continued on following page)

States to erect parochial legal barriers that would render meaningless our foreign policy objectives and international obligations.

III. Allowing State Courts To Refuse To Enforce the *Avena* Ruling Also Would Damage U.S. Foreign Policy Interests Governed by Other Treaty Regimes.

As U.S. diplomats, *Amici* consistently have sought to ensure the proper functioning of the international treaty regimes to which the United States is a party. *Amici* believe that the state courts' failure to respect the ICJ's determinations in this context will threaten U.S. commercial and economic interests in other treaty regimes.

The ICJ dispute-settlement provisions in the VCCR are not *sui generis*. After World War II, when international trust and diplomacy were at a low ebb, the United States took the initiative to establish numerous treaties with its former enemies that resolved disputes through binding decisions of the ICJ.[46]

In return for our commitment to abide by ICJ judgments, the United States gained not only the cooperation of other states, but also a powerful diplomatic tool for encouraging non-judicial resolution of disputes.[47] Even

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Department of State, Consular Information Sheet: India, Aug. 24, 2005, *available at* http://travel.state.gov/travel/cis_pa_tw/cis/cis_1139.html (last visited Dec. 19, 2005).

[46] *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, U.S.-F.R.G., art. XXVII, 7 U.S.T. 1839, 1867; Treaty of Peace with Japan, Sept. 8, 1951, art. 22, 3 U.S.T. 3169, 3188-89.

[47] Indeed, "[m]any cases are settled before a final judgment is reached," giving the ICJ "an important 'pacifying effect' on disputes at all stages of litigation." Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434, 436 (2004).

nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ.[48]

The "mutuality and reciprocity" that forms the foundation of international relations is particularly critical for the effective operation of our nation's commercial and economic treaties. *See generally United States v. Arjona*, 120 U.S. 479, 487 (1887) ("[I]nternational law obligations are of necessity reciprocal in nature."). The continuing ability of the United States to secure international treaty regimes vital to the realization of our national interests throughout the world, and to secure reliable enforcement of those regimes already in place, depends directly upon our reputation for honoring the international obligations that we undertake.

The last half of the twentieth century has witnessed the direct application of international trade agreements to a multitude of commercial relationships between individuals and nations. A vast array of agreements dealing with international trade and foreign investment now call for binding arbitration or resort to permanent international tribunals to resolve intractable disputes. Moreover, many important economic treaties vest compulsory jurisdiction in the ICJ, including international sovereign disputes

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[48] *See, e.g.*, *Trial of Pakistani Prisoners of War (Pak. v. India)*, 1973 I.C.J. 328 (July 13), and 1973 I.C.J. 347 (Dec. 15) (dispute settled out of court). For example, when the United States inadvertently downed an Iranian civilian airliner, killing 290 passengers and crew, despite our strained diplomatic relations, Iran sought a peaceful solution by bringing suit before the ICJ, and the parties ultimately were able to achieve a negotiated settlement. *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 1989 I.C.J. 132 (Dec. 13), and 1996 I.C.J. 9 (Feb. 22).

ranging from the international recognition of copyrights[49] and patents[50] to the transport of goods by air.[51]

The United States has also agreed to submit to the jurisdiction of other binding arbitration mechanisms to protect U.S. trade and investment interests. Of most recent significance to commercial interests are Chapter 11 of the North American Free Trade Agreement ("NAFTA")[52] and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") of the World Trade Organization ("WTO").[53] Together, NAFTA and the WTO grant private interests and sovereign nations, respectively, compulsory resort to binding arbitral tribunals.

The benefits stemming from these treaties and their binding dispute-resolution mechanisms are not illusory. Since 1996, American investors have initiated arbitral proceedings under NAFTA against the government of Canada at least eight times, and against the government of Mexico at least twelve times, with at least five of those cases resulting in compensation for the American investors, while

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[49] Universal Copyright Convention, art. XV, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146.

[50] Patent Cooperation Treaty, art. 59, *opened for signature* June 19, 1970, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262.

[51] International Air Transport Agreement, art. IV, § 3, *opened for signature* Dec. 7 1944, 3 Bevans 922, 925, 84 U.N.T.S. 389, 394; *see also* Convention on International Civil Aviation, ch. XVIII, art. 84 *opened for signature* Dec. 7, 1944, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352.

[52] North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, 32 I.L.M. 605, 639 (1993).

[53] In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation "to have recourse to and abide by the rules and procedures" of the DSU. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994).

six of the cases remain pending.[54] Similarly, 74 of the 324 disputes that have been initiated before WTO tribunals were brought by the United States as a complainant.[55]

There is no guarantee that the diplomatic fallout from the several States' ongoing flouting of the ICJ and the VCCR can be limited to those settings. We cannot expect other nations to abide by the judgments of international dispute-resolution and arbitral bodies, if our state courts regularly fail to accord comity and respect to the ICJ's treaty interpretation in *LaGrand* and *Avena*. Condoning the failure of the several States to comply with the treaty interpretation in *Avena* would damage U.S. interests under numerous treaty regimes that ensure the security of our citizens and safeguard our commercial interests, as well as undermine the United States's ability to negotiate new diplomatic covenants.

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[54] For a list of NAFTA Chapter 11 cases, see NAFTA Investor-State Arbitrations, *at* http://www.state.gov/s/l/c3439.htm (last visited Dec. 18, 2005), and NAFTA-Chapter 11-Investment, *at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-en.asp (last visited Dec. 18, 2005). *See also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 760 (2004) (recognizing U.S. adherence to the decision of a NAFTA arbitration panel); *Canada v. S.D. Myers, Inc.*, [2004] F.C. 38, ¶¶ 37, 39 (affording a "high level of deference" to a NAFTA Tribunal in affirming a $7 million award to an American investor against the Canadian government, "so as to be sensitive to the need of a system for predictability in the resolution of disputes").

[55] *See, e.g.*, Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997) (complaint by the United States); Panel Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/R/USA (Aug. 18, 1997) (complaint by the United States). For a list of past and pending DSU cases, see WTO, Chronological List of Dispute Cases, *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Dec. 18, 2005).

CONCLUSION

In cases such as this, this Court should look beyond narrow U.S. interests to the "mutual interests of all nations in a smoothly functioning international legal regime" and, whenever possible, should "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."[58] For the foregoing reasons, *Amici* urge the Court to find that the nation's diplomatic, commercial, and economic interests will best be served by directing the state courts whose decisions are under review to adhere faithfully to the ICJ's interpretation of Article 36, as set forth in the *LaGrand* and *Avena* decisions.

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[58] *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part and dissenting in part).

Madeleine K. Albright served as U.S. Secretary of State from 1997-2001 and as U.S. Ambassador and Permanent Representative to the United Nations from 1993 to 1997.

Morton Abramowitz, a Career Ambassador, served as Assistant Secretary of State for Intelligence and Research, U.S. Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna, U.S. Ambassador to Turkey and Thailand, and Deputy Assistant Secretary of Defense for Inter-American, East Asian and Pacific Affairs.

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Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the Permanent Court of Arbitration, The Hague, from 1978 to 1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States.

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Supreme Court, U.S.
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Nos. 04-10566 and 05-51

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

MARIO A. BUSTILLO,

Petitioner,

v.

GENE M. JOHNSON,
Director of the Virginia Department of Corrections,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF OREGON AND VIRGINIA

BRIEF OF INTERNATIONAL COURT OF JUSTICE EXPERTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici are professors and scholars of law expert in the fields of international law, international dispute settlement, and the application of international law by courts in the United States.[1] (A List of *Amici* is set forth in the Appendix.) *Amici* are experienced in the work of international tribunals, notably the International Court of Justice (ICJ), and include former officials of the U.S. Department of State who have represented the United States at the ICJ. *Amici* seek to present their views concerning the significance of final judgments of the ICJ interpreting a treaty of the United States in proceedings in which the United States participated fully, and the respect that should be accorded to the ICJ's treaty interpretation by all courts in the United States, in the context of petitions for review and reconsideration of convictions of serious crimes (such as murder) entailing severe penalties.

Amici limit their submission to issues of the ICJ's interpretation of the treaty and rights that individuals may assert under it in domestic courts; they do not address the factual basis for petitioners' claims. *Amici* are united in the view that ICJ judgments interpreting the treaty, rendered in cases to which the United States was party, supply the basis for rules of decision for courts in the United States to which claims under the treaty may be presented; that state courts are required to apply the treaty as interpreted by the ICJ; that state procedural default rules cannot foreclose the exercise of treaty rights to a hearing as held by the ICJ; and that petitioners have the right to present their treaty-based claims before the courts of Oregon and Virginia.

SUMMARY OF ARGUMENT

These consolidated petitions present questions concerning the remedies to be accorded by state courts for violations of the Vienna Convention on Consular Relations, in light of authoritative rulings by the International Court of Justice on the meaning of the Convention and how the United States is

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[1] No party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

required to apply it. This Court's disposition in *Medellin v. Dretke*, 125 S.Ct. 2088 (2005), left undecided the underlying issue of the reception into the U.S. legal system of the ICJ's decisions interpreting the treaty.

The Oregon and Virginia courts denied any remedy to either petitioner, on the basis of erroneous views that the treaty does not create individual rights enforceable in a domestic judicial proceeding and that state procedural rules can foreclose a well-founded treaty claim. In part, the error of the courts below was based on what they understood to be the import of *Breard v. Greene*, 523 U.S. 371 (1998), which in turn was based on assumptions that had not had the benefit of plenary briefing, at a time when the ICJ had not yet ruled on questions of treaty interpretation that were properly presented to it. Subsequent to *Breard*, the ICJ has clarified the nature of the rights invocable under the treaty, the treaty-based requirement of a judicial remedy for their violation, and the proper relationship between the rights guaranteed by the treaty and the procedural framework for their exercise under local law. This Court should now revisit its *Breard* conclusions and instruct the lower courts to allow petitioners to present their treaty claims to the appropriate judicial bodies, free of any misconceptions about the treaty-based rights and remedies at issue and of the procedural obstacles that the ICJ has determined to constitute impediments to the exercise of treaty rights.

The ICJ's *LaGrand* and *Avena* decisions constitute the authoritative interpretation of the Vienna Convention as regards nationals of treaty parties who have been sentenced to severe penalties without having been informed of their treaty rights. The rights in question derive from the treaty itself; *LaGrand* and *Avena* clarify the nature and content of those rights and the treaty-based remedies for their enforcement. (Section I.)

LaGrand and *Avena* resulted from a treaty-based dispute settlement process to which the United States fully consented, in which the United States fully participated, and which produced an interpretation of the Vienna Convention that removes any doubt about the obligations of the United States

as a whole toward nationals of treaty parties. The Vienna Convention as interpreted in *LaGrand* and *Avena* binds state authorities; the treaty obligations in question are directed to procedural matters addressed in the ordinary course by domestic courts; and state courts are required by the Supremacy Clause of the Constitution to exercise their judicial powers within their respective jurisdictions to carry out these obligations of the United States. (Section II.)

This Court should endorse as the federal rule of decision the interpretation of the treaty that has now been twice confirmed by the ICJ in cases to which the United States was a party. There is no basis for state courts to continue to follow an Executive Branch litigation position that has been displaced by the appropriate international dispute settlement process to which the United States committed itself in a constitutionally proper way. (Section III.)

The Vienna Convention as interpreted in *LaGrand* and *Avena* does not require Oregon or Virginia to set petitioners free or to refrain from carrying out their sentences, if the courts below were to find after a hearing that the treaty violations had not affected petitioners' ability to defend themselves. What the Convention requires is a judicial forum in which petitioners can have a hearing on their claims that they suffered actual prejudice from the treaty violations – violations neither Oregon nor Virginia has denied. This Court should therefore remand for hearings in which petitioners' treaty claims could be examined on their merits. In the case of petitioner Sanchez-Llamas, the Oregon courts should reexamine his case, informed by the *LaGrand* and *Avena* interpretation that the treaty establishes judicially enforceable individual rights. In the case of petitioner Bustillo, the Virginia courts should remove the barrier of the state procedural default rule, which was applied in a way that the ICJ has found to be inconsistent with treaty rights.

ARGUMENT

I. The ICJ Has Authoritatively Determined The Interpretation And Application Of The Vienna Convention For Purposes Of The Questions Presented In These Petitions.

The courts below based their denials of relief on incorrect assumptions about the interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [Vienna Convention] and its application as a controlling source of law for state courts. The Oregon court in No. 04-10566 adopted the position that the Vienna Convention does not confer individual rights enforceable in judicial proceedings; the Virginia court in No. 05-51 held that a state procedural default rule could be applied to foreclose a Vienna Convention claim. These positions have now been definitively rejected by the International Court of Justice [ICJ].[2] Since petitioners are covered by the Vienna Convention (Section I.A), they are entitled to benefit from the ICJ's construction concerning judicially enforceable individual rights (Section I.B) and procedural default (Section I.C), and are entitled to the same treaty-based remedy as the ICJ held to be required for the individuals covered by *LaGrand* and *Avena* (Section I.D).

A. Petitioners Are Foreign Nationals Covered By The Vienna Convention Whose Rights Under The Convention Were Violated.

Petitioners are foreign nationals from states parties to the Vienna Convention, which provides in Article 36(1)(b) that if such a national is arrested or detained, he shall be informed

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[2] No decision of this Court should have been understood as standing in the way of full implementation of the ICJ's authoritative interpretation. *Breard v. Greene*, 523 U.S. 371 (1998), left open the possibility that the Vienna Convention entails judicially enforceable individual rights, *see* 523 U.S. at 376 (treaty "arguably confers on an individual the right to consular assistance following arrest"), but concluded that such rights, if they exist, could be cut off by a later-in-time federal statute, which is not involved here. In *Medellin v. Dretke*, 125 S.Ct. 2088, 2091 n. 3 (2005), this Court noted that the ICJ had held in *Avena* that the Vienna Convention does establish individually enforceable rights. *Breard* did not address the situation of state rather than federal procedural default rules, an issue now pending in Texas in the *Medellin* matter.

"without delay of his rights" to have his consular post notified and to communicate with the consulate. The obligations of parties to the Vienna Convention have been interpreted several times in cases involving the United States brought under the Optional Protocol to the Vienna Convention Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325. T.I.A.S. No. 6820, 596 U.N.T.S. 487 [Optional Protocol], including in *LaGrand* (F.R.G. v. U.S.), 2001 ICJ 466, and *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 ICJ No. 128. *LaGrand* held that the Vienna Convention does establish rights for individuals, that procedural default rules must not be applied to prevent the exercise of treaty rights, and that the remedy for violations of Article 36 consists in the obligation of the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of affected individuals. *Avena* confirmed these conclusions and further specified that the remedy of review and reconsideration is to be carried out in judicial proceedings. (Sections I.B, I.C.) *LaGrand* and *Avena* likewise held that the requirement of review and reconsideration applies as a matter of interpretation of the Vienna Convention not only in the cases of the individuals named in the judgments, but also in other cases under the treaty entailing "severe penalties." (Section I.D.)

Petitioner in No. 04-10566, Moises Sanchez-Llamas, is a national of Mexico who was convicted in Oregon of 11 felony counts, including attempted murder and assault in the first degree, and sentenced to 246 months' imprisonment – undoubtedly "severe penalties" under *LaGrand* and *Avena*. He was advised of his *Miranda* rights in Spanish and English but not notified of his right to contact the Mexican consulate before he confessed. Prior to trial, he moved to suppress his confession because of the Vienna Convention violation. The denial of this motion was upheld by the Supreme Court of Oregon on the ground that the Vienna Convention does not provide for judicially enforceable individual rights. *Oregon v. Sanchez-Llamas*, 338 Ore. 267, 108 P.3d 573 (2005). This position is inconsistent with the ICJ's decision in *Avena* that the Vienna Convention does establish individual rights and that the

proper remedy under the treaty for violation of those rights is to be determined in a judicial hearing. (Section I.B.)

Petitioner in No. 05-51, Mario A. Bustillo, is a national of Honduras - a country which, like Mexico, is party to the Vienna Convention. He was convicted of murder and sentenced to 30 years' imprisonment - unquestionably "severe penalties" - without awareness of his consular rights. He claims that the crime was actually committed by another Honduran national who fled to Honduras, and he has introduced a declaration from the Honduran consulate to the effect that it would have been able to help him identify that individual and obtain potentially exculpatory evidence if he had had consular access prior to trial. The Virginia courts denied relief on the ground of procedural default, because he had not raised his Vienna Convention claim at trial. App. to Pet. for Certiorari, pp. 20a, 40a, 44a, 47a. This denial is inconsistent with the ICJ's holding that procedural default rules (while not invalid *per se*) must not be applied to foreclose a judicial hearing on a claim that failure to inform a defendant of his treaty rights had prevented him from asserting them and that he had suffered prejudice from that failure. (Section I.C.)

B. The *LaGrand* And *Avena* Judgments Establish That The Vienna Convention Confers Individual Rights To Be Enforced In Domestic Judicial Proceedings.

In *LaGrand* (paras. 75-77), the ICJ laid to rest all debate about the nature of the Vienna Convention rights in question as rights of the individual concerned. The ICJ specifically rejected the U.S. contention (para. 76) that the rights at issue are rights of states and not of individuals, concluding (based on the text of the provisions in context) "that Article 36, paragraph 1, creates individual rights."[3] In *Avena*, the ICJ reaffirmed its *LaGrand* conclusion on individual rights and additionally observed (para. 40) "that the individual rights of Mexican nationals under [Article 36(1)(*b*)] are rights which are to be asserted, at any rate in the first place, within the

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[3] *LaGrand*, para. 77; *see also* paras. 38, 42, 74, 78, 126, and *Avena*, paras. 35, 40, 124, 139-140 (on the contentions of Germany and the United States concerning individual rights).

domestic legal system of the United States."[4] The ICJ explained that these "are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law" (para. 140), thereby recognizing that an individual's treaty right to consular assistance is analytically and practically different from constitutional rights.[5]

Avena specified further that a judicial hearing is required to redress violations of these treaty-based individual rights. The ICJ expressly rejected the U.S. contention that nonjudicial remedies such as clemency could satisfy treaty requirements and explained the need for a judicial remedy within the individual's own criminal proceedings as an interpretation of Article 36.[6] This aspect of *Avena* crucially locates the remedial dimension *as a matter of interpretation and application of the Vienna Convention itself.* As the United States has stated in the past (referring to ICJ treaty cases), the question of remedy for a treaty violation is itself a question of treaty law:

> The Court's jurisprudence establishes that "the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation

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[4] This observation responded to the U.S. position that Mexico's ICJ application should be considered inadmissible as to any Mexican national who had not exhausted all remedies in U.S. courts. The U.S. assertion before the ICJ that there might be remedies remaining to be exhausted in the U.S. legal system was in tension with the U.S. position at the ICJ – and in U.S. domestic courts – that the treaty did not create judicially enforceable rights. The ICJ has rejected this position as a matter of treaty interpretation, and this Court should reject it as well. *See* Section III.

[5] Petitioner Bustillo's case is an apt illustration of this proposition. Consular services from the government of Honduras could have helped him obtain immigration records and other official documents concerning another Honduran national – assistance beyond the power of his own counsel or any U.S. state or federal authority to provide.

[6] *See Avena*, paras. 121 (remedy for Article 36 violation to be carried out "by the United States courts"), 122 (question of prejudice "is an integral part of criminal proceedings before the courts of the United States"), 127 (legal consequences of breach "to be examined under the concrete circumstances of each case by the United States courts concerned"), 140 ("it is the judicial process that is suited to this task"), 141 (review and reconsideration "should occur within the overall judicial proceedings relating to the individual defendant concerned").

> therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; see also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.)

Memorial of the Government of the United States of America, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran),1979 ICJ Pleadings 121 at 188.

C. The ICJ Has Held That Applications Of The Procedural Default Rule To Prevent Adjudication Of Whether An Individual Has Been Prejudiced By A Treaty Violation Are Incompatible With The Treaty.

In both *LaGrand* and *Avena*, the ICJ addressed in detail the U.S. position that procedural default rules could foreclose presentation of treaty claims and gave a reasoned explanation for not accepting that position.[7] The ICJ concluded that while the procedural default rule in itself does not violate Article 36, particular applications of the rule can violate the Convention, namely when a breach of Article 36(1) through failure to inform the individual of his rights precluded the exercise of his or his country's treaty rights.

As with the ICJ's treatment of the question of judicial remedy (Section I.B), the issue of application of the procedural default rule is itself a question of treaty law – specifically of interpretation and application of Article 36(2) of the Vienna Convention, which provides that the domestic framework for exercise of treaty rights "must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended." In *Breard*, this Court assumed that the mention in Article 36(2) of "the laws and regulations of the receiving State" validated the operation of rules of procedural default in U.S. habeas jurisprudence, but that assumption was made

[7] *See LaGrand*, paras. 50, 58-60, 79-91, 125, 128(7); *Avena*, paras. 111-113, 133-134, 138. In *Avena*, the treatment of procedural default and related questions comes under the general heading of "Article 36, paragraph 2," beginning at para. 107 of the judgment.

without benefit of full briefing on whether such rules "enable full effect to be given" to Article 36's purposes. The matter was later considered in a full adversarial posture in *LaGrand* and *Avena*, and the ICJ's decisions in those cases have undercut this Court's assumption in *Breard*. As on other occasions when this Court has had drawn to its attention materials relevant to the proper international interpretation of a treaty, it would be appropriate for this Court to reconsider and revise its previous conclusions with attention to the ICJ's treatment.[8]

D. The ICJ Has Held That The Remedy Required By The Vienna Convention For Violations Is Review And Reconsideration Of Convictions And Sentences In Circumstances Like Those Of Petitioners, Involving "Severe Penalties."

At the ICJ merits phase of *LaGrand*, review and reconsideration of the convictions and sentences of the particular individuals was impossible, since the LaGrand brothers had been executed. Nonetheless, Germany drew to the ICJ's attention the fact that other German nationals were or could be similarly situated and asked the ICJ to frame its judgment with such cases in view. *LaGrand*, paras. 117-125. In that regard, the ICJ reasoned that an apology would not suffice where individuals "have been subjected to prolonged detention or convicted and sentenced to severe penalties" (para. 125) and addressed the remedies for such individuals in the last dispositive paragraph of the judgment.[9] Similarly, in *Avena*, Mexico made the ICJ aware that beyond the specific

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[8] *Cf. United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (revisiting treaty question decided in *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), after receiving translated Spanish text). In light of the ICJ's view of U.S. treaty obligations, a *Charming Betsy* analysis of the later-in-time federal statute (not involved in the present cases) might be appropriate if the statute involved in *Breard* reaches this Court again.

[9] *LaGrand*, para. 128(7) (adopted 14-1):

> *Finds* that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(*b*) of the Convention having been respected, the United States of America, by means of its own choos ng, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

individuals on whose behalf it brought the case, treaty violations continued to occur and other Mexican nationals whose rights had been violated were at various stages of criminal proceedings; Mexico therefore asked for the judgment to protect those and any future Mexican nationals in comparable situations. *See Avena*, para. 146 (referring to at least 100 cases in first half of 2003 in which Mexican nationals had been arrested for serious felonies without timely notice of their consular rights). The ICJ addressed Mexico's request in the last dispositive provision of the judgment,[10] and by a paragraph in its reasoning explaining the obligations of the United States flowing from the treaty itself and applying to all nationals of treaty parties:[11]

> 151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing

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[10] *Avena*, para. 153 (11) (adopted unanimously):

> *Finds* that, *should Mexican nationals nonetheless be sentenced to severe penalties*, without their rights under Article 36, paragraph 1(*b*), of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment. [Emphasis added.]

[11] To similar effect, see Declaration of President Guillaume in *LaGrand*, 2001 ICJ at 517 ("in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph."). On the import of *LaGrand* and *Avena* for nationals of states other than Germany and Mexico, see Section III.A.

> the *issues of principle* raised in the course of the present proceedings *from the viewpoint of the general application of the Vienna Convention*, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to *other foreign nationals* finding themselves in similar situations in the United States. [Emphasis added.]

Petitioner Sanchez-Llamas, as a Mexican national sentenced to severe penalties, is without doubt comprehended within both paragraph 151 and dispositive paragraph 153(11) of *Avena*; petitioner Bustillo is surely one of the similarly situated "other foreign nationals" under the ICJ's authoritative interpretation of the Vienna Convention.

II. *LaGrand* And *Avena* Resulted From A Treaty-Based Dispute Settlement Process To Which The United States Agreed, In Which The United States Participated Fully, And Which Specifies Treaty Obligations For The United States As A Whole.

Amici respectfully emphasize the fully consensual nature of the obligations undertaken by the United States in adhering to the Vienna Convention and Optional Protocol. The Optional Protocol serves as a forum selection clause, with the effect that parties that have selected the ICJ as the forum to decide their disputes are bound to carry out its decisions.[12] Thus, once having given consent to both the Vienna Convention and the designated forum for dispute settlement, the United States is obligated to comply with the Convention, as interpreted by the ICJ.

A. The Vienna Convention Establishes Uniform Consular Standards.

The Vienna Convention codifies into multilateral treaty law a body of rules that evolved over centuries. Before the

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[12] *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing arbitration agreement).

Vienna Convention, disputes over consular relations frequently led to diplomatic protests and international arbitration.[13] By the mid-20th century, the desirability of a multilateral treaty to codify consular law and provide for settlement of consular disputes was clear. Treaty codifications of customary international law produce greater certainty and enjoy a clearer status than custom in many legal systems. A multilateral mechanism for binding settlement of consular disputes would likewise strengthen compliance and obviate the need for special arbitration agreements.

Codification of consular law was undertaken by the U.N. International Law Commission and a diplomatic conference. *See* 1961-II Y.B. INT'L L. COMM'N 88-128. The United States played a leading role in negotiating the specific wording of Article 36 of the Convention and the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess., May 8, 1969, at 41, 59-61 [Report of U.S. Delegation]. The United States actively advocated the provision that became the Optional Protocol and resisted others' efforts to eliminate or weaken dispute settlement. *See* Report of U.S. Delegation at 72-73. The formulation from the Vienna Conference, fully supported by the United States,

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[13] *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 830-837 (1942) [Hackworth]; M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, vol. 7 at 626-658; vol. 8 at 807-837 (1970). In the 1920s, a U.S.-Mexican claims commission held that "a foreigner, not familiar with the laws of the country where he temporarily resides, should be given [the] opportunity" of consular access. *Walter H. Faulkner* (U.S. v. Mex.), Opinions of the Commissioners Under the Convention Concluded September 8, 1923 (1927) at 86, 90; *see also* 4 Hackworth 830. Conversely, where California officials did not give the Mexican consulate access to a detained Mexican citizen, the Department of State stressed the importance of California's compliance with standards maintained by the United States in its dealings with other countries:

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens.

4 Hackworth 836.

was an Optional Protocol that states would be free to accept or not; upon acceptance, a binding obligation would be created. *Ibid.* The United States voluntarily accepted the Optional Protocol when it ratified the Vienna Convention in 1969.[14]

No state can unilaterally determine the meaning of an international treaty.[15] Thus, in a dispute over the interpretation and application of the Vienna Convention, the United States cannot impose its own view on its treaty partners,[16] or establish the measure of its own treaty compliance. Nor can disputes over the application of the Vienna Convention to particular facts, or over the remedy for breach, be determined by the United States as one party to the dispute.

B. The United States Consented To ICJ Jurisdiction To Decide Disputes Under The Vienna Convention And Is Therefore Required To Give Effect To The Resulting Interpretation Of The Disputed Treaty Provisions.

The United States freely agreed to the compulsory jurisdiction of the ICJ to resolve Vienna Convention disputes, and thus voluntarily accepted an obligation to give effect to the ICJ's interpretation resulting from the dispute settlement procedure. The basis for ICJ compulsory jurisdiction is Article I of the Optional Protocol.[17] The jurisdiction of the ICJ in

[14] On March 7, 2005, the United States gave notice of withdrawal from the Optional Protocol. (Section II.C.)

[15] *See Jesse Lewis (The David J. Adams) Claim* (U.S. v. Gr. Br., 1921), 6 U.N. Rep. Int'l Arb. Awards 85 (British court decision could not be conclusive of meaning of U.S.-British treaty; arbitral tribunal had competence to interpret the treaty authoritatively). *See also Mitsubishi*, 473 U.S. at 629; *Bremen*, 407 U.S. at 9 (U.S. courts should not "insist on a parochial concept that all disputes must be resolved under our laws and in our courts. ... We cannot have [international dealings] exclusively on our terms, governed by our laws, and resolved in our courts.").

[16] For this reason, U.S. courts ought to give careful consideration to reasoned positions adopted by foreign or international as well as U.S. courts on points of treaty interpretation. *Cf. Olympic Airways v. Husain*, 540 U.S. 644, 660-661 (2004) (Scalia, J., dissenting). Where a tribunal has been accepted by the U.S. political branches as the forum for binding settlement of treaty disputes, deference to its conclusions is not just advisable but required as a matter of treaty law.

[17] Article I states: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory

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LaGrand and *Avena* was founded on consent and reciprocity under Article 36(1) of the ICJ Statute, which establishes jurisdiction over "all matters specially provided for ... in treaties and conventions in force." At all times relevant to *LaGrand* and *Avena*, the Optional Protocol was a treaty in force under Article 36(1) of the ICJ Statute. Because the United States consented through the proper processes under domestic and international law to submit Vienna Convention disputes to ICJ jurisdiction, it is required to implement the outcome of the procedure.[18]

The United States was the first state to turn to the ICJ in a Vienna Convention dispute, when it brought an application against Iran concerning U.S. diplomatic and consular personnel held hostage in Tehran in 1979. *See United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3, 5, 24-26. The U.S. pleadings in that matter analyze the obligation of parties to the Optional Protocol when disputes arise to abide by ICJ decisions. *See* 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran*, at 141-152.[19] When the ICJ indicated provisional measures in 1979 and entered judgment in 1980, the United States insisted on Iranian compliance and invoked the ICJ's decisions in U.S. and foreign tribunals.

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jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol."

[18] *See* U.N. Charter, 59 Stat. 1031, art. 94 ("Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party.").

[19] The availability of the ICJ to the United States in that case differed from the situation prior to the Vienna Convention, when the United States was unable because of the lack of jurisdictional consent to bring disputes over consular access to an authoritative tribunal. In 1954 the United States filed an ICJ case against Hungary claiming denial of consular access to four U.S. airmen who were tried in Hungary after their plane was brought down. 1954 ICJ Pleadings, *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. Hung.), at 19-20, 31, 35-36. The case was dismissed because Hungary had not consented to ICJ jurisdiction. 1954 ICJ 99. Hungary is now party to the Vienna Convention and the Optional Protocol.

Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ.[20] These include bilateral and multilateral treaties involving substantial economic, political, and other interests. The United States is a frequent litigant at the ICJ, both as applicant and as respondent. Indeed, the United States has been involved in more ICJ cases than any other state:[21] in total, the United States has been party to 21 cases at the ICJ,[22] of which 10 have been brought by the United States as applicant or by special agreement and 11 have been brought against the United States.[23] Since each of the 70 treaties with an ICJ dispute settlement clause entails obligations under those treaties and under the U.N. Charter (art. 94) and ICJ Statute (arts. 36(1), 59), failure to carry out *LaGrand* and *Avena* could prejudice the ability of the United States to hold other states to their

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[20] *See* Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 58-81 (Lori F. Damrosch ed., 1987) [CROSSROADS]. To the best of *Amici*'s knowledge, with only three exceptions (see below) all such treaties remain in force for the United States as of 2005, as specified for each such treaty in the Department of State publication, TREATIES IN FORCE. Two treaties with ICJ clauses came into force for the United States after completion of the Morrison study: the Convention on the Physical Protection of Nuclear Materials, T.I.A.S. No. 11080 (in force Feb. 8, 1987), and the International Convention on the Taking of Hostages, T.I.A.S. No. 11081 (in force Jan. 6, 1985).

In 1985 the United States gave notice of termination of jurisdiction under the optional clause of Article 36(2) of the ICJ Statute and of a treaty of friendship with Nicaragua (the bases of jurisdiction on which the ICJ had relied in the *Nicāragua* case, note 25), and in 2005 gave notice of withdrawal from the Optional Protocol under the Vienna Convention. (Section II.C.)

[21] For a listing of all ICJ cases grouped by state, see the ICJ website at www.icj-cij.org.

[22] The United States has also taken part in almost all proceedings for advisory opinions under Article 65 of the ICJ Statute. *See* Goler Teal Butcher, *The Consonance of U.S. Positions with the International Court's Advisory Opinions, in* CROSSROADS at 423; for a current listing, see ICJ Website.

[23] The cases initiated by the United States include seven involving Soviet-bloc aerial incidents, as well as *Tehran Hostages* (Iran 1979-81), *Gulf of Maine* (Canada 1981-84), and *Elettronica Sicula S.p.A. (ELSI)* (Italy 1987-89). *See* pp. 17-18 below.

dispute settlement obligations and to sustain U.S. credibility before the ICJ in future proceedings. While not all of these treaties are self-executing or confer individual rights subject to judicial protection, the Vienna Convention is indeed a treaty contemplating domestic judicial implementation in favor of individuals as confirmed in *Avena*, and this Court should therefore ensure that state courts fulfill those treaty rights in accordance with the ICJ's interpretation.

The United States has a major stake in maintaining a record of abiding by the outcome of ICJ dispute settlement, since it continues to be active in that forum. Compliance with ICJ final judgments has generally been high, including in the cases in which the United States has been a party.[24] States have exceptionally disregarded ICJ rulings when they considered that the ICJ lacked a proper consensual foundation to decide the case, notably where respondents insisted that the ICJ had been granted no competence to decide a matter involving a state's vital security interests.[25] In the Vienna Convention cases, jurisdiction was by consent and no security interest would be prejudiced by compliance. Indeed, President Bush's memorandum on compliance with *Avena* (Section III) confirms the national interest in fulfilling international obligations.

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[24] Recent studies find compliance with two-thirds of the ICJ's substantive judgments and as high as 80% compliance with final judgments over a substantial period. *See* Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 456-460 (2004) (compliance rate of 60% with judgments issued in last 15 years; likelihood that rate would go up to 80% rate for prior periods in light of efforts to comply over time); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308-1311 (2004) (overall compliance rate of 68%, counting disregard of provisional measures as noncompliance); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court*, *in* CROSSROADS at 288, 310-319 (only 5 cases of noncompliance with final judgments 1946-1986).

[25] See especially the U.S. position on *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 ICJ 14, note 34 below. France denied the existence of proper ICJ jurisdiction in *Nuclear Tests* (Austl. & N.Z. v. Fr.), 1974 ICJ 253, 457. The United States and France reacted to these cases by withdrawing from the general compulsory jurisdiction clause of Article 36(2) of the ICJ Statute, while maintaining treaty-based acceptances under Article 36(1).

Implementation of ICJ judgments has proceeded smoothly in almost all treaty-based cases and those involving the rights of aliens within a state's territory. In the first case leading to a final judgment involving the United States, both the United States and France promptly complied with the judgment in *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 ICJ 176.[26] In *Gulf of Maine* (Canada/U.S.), 1984 ICJ 246, the final judgment drew a maritime boundary; both sides accepted the judgment and promptly complied.[27] In *ELSI*, 1989 ICJ 15, the United States embraced the ICJ forum as part of its diplomacy and accepted the judgment as dispositive of the claims it had raised on behalf of U.S. investors.[28] Thus, apart from *Nicaragua* (addressed in note 34 below) and such continuing problems as may exist in the wake of *LaGrand* and *Avena*, the United States has complied with all final ICJ judgments addressed to it and has benefited from the compliance of all of its adversaries with final judgments

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[26] The final judgment in *Morocco* had elements requiring implementation by each side. The United States dismissed all cases before U.S. consular courts in Morocco that were outside the limits of jurisdiction specified by the ICJ, and French courts relied on the judgment in local (Moroccan) and appellate rulings (by the *Cour de cassation*), which referred to the ICJ judgment as dispositive. *See* Manley O. Hudson, *The Thirty-First Year of the World Court*, 47 AM. J. INT'L L. 1, 8, 14-15 (1953); Note, *Judicial Decisions: Morocco–Criminal Jurisdiction over U.S. Citizens– ... –International Court of Justice*, 49 AM. J. INT'L L. 263, 267 (1955); CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 199, 221 n. 100 (1981) (French courts "do not seem to have regarded any domestic implementing measures for the application of the International Court's judgment as being necessary;" direct application of decision derived from French submission to ICJ jurisdiction).

[27] Compliance having been assumed, only a few cases refer to the ICJ judgment. *See, e.g., Conde v. Starlight I Inc.*, 103 F.3d 210 (1st Cir. 1997) (Hague Line mentioned); *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1992] 3 F.C. 54 (Can. Fed. Ct.), *rev'd*, [1995] 2 F.C. 467, *aff'd*, [1997] 1 S.C.R. 12 (plaintiff sought fishing license in area awarded to Canada by ICJ); *Mersey Seafoods Ltd. v. Minister of Nat'l Revenue*, [1985] 2 C.T.C. 2485 (Can. Tax Ct.), paras. 142-147 (ICJ decision became available after arguments concluded).

[28] *See* Terry D. Gill, *International Court of Justice – Diplomatic Protection – U.S.-Italian Treaty of Friendship, Commerce and Navigation*, 84 AM. J. INT'L L. 249, 257 (1990).

addressed to them, except for Iran in the *Tehran Hostages* case.[29] In view of the U.S. interest in credible fulfillment of dispute settlement undertakings,[30] this Court should ensure that the

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[29] In addition to the cases discussed in the text, the disposition of the remainder of the 21 cases to which the United States has been party is as follows:

Dismissal on Threshold Ground (No Jurisdiction or Claim Inadmissible): The seven Soviet-bloc *Aerial Incident* cases were dismissed for lack of jurisdiction. 1954 ICJ 99 (U.S. v. Hung.); 1954 ICJ 103 (U.S. v. USSR); 1956 ICJ 6 (U.S. v. Cz.); 1956 ICJ 9 (U.S. v. USSR); 1958 ICJ 158 (U.S. v. USSR); 1959 ICJ 276 (U.S. v. USSR); 1960 ICJ 146 (U.S. v. Bulg.). *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K., U.S.), 1954 ICJ 19, was dismissed for lack of an indispensable party. *Interhandel* (Switz. v. U.S.), 1959 ICJ 16, was dismissed for failure to exhaust local remedies. *Legality of Use of Force* (Yugo. v. U.S.), 1999 ICJ 916, was dismissed for lack of jurisdiction.

Dismissal Upon Settlement: *Aerial Incident of 3 July 1988* (Iran v. U.S.), 1996 ICJ 9, was discontinued after the United States agreed to make an *ex gratia* payment. *Lockerbie (Questions of Interpretation and Application of the 1971 Montreal Convention)* (Libya v. U.S.), 2003 ICJ 152, was discontinued upon an overall settlement. *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 ICJ 426, was discontinued after provisional measures and before the merits.

Dismissal on Merits: *Oil Platforms* (Iran v. U.S.), 2003 ICJ 161, was dismissed on the merits of both Iran's claim and the U.S. counterclaim.

[30] On rare occasions of U.S. failure to implement obligations resulting from dispute settlement (as with prolonged noncompliance with the *Chamizal* arbitral award in Mexico's favor), detriments to U.S. economic and political interests are well-documented. *See* SHELDON B. LISS, A CENTURY OF DISAGREEMENT: THE CHAMIZAL CONFLICT, 1864-1964 68-69, 75-77, 86-88, 100-101 (1965); ANTONIO GÓMEZ ROBLEDO, MÉXICO Y EL ARBITRAJE INTERNACIONAL 161 (1965); Percy Don Williams, Jr., *Fifty Years of the Chamizal Controversy – A Note on International Arbitral Appeals*, 25 TEX. L. REV. 455, 461-462 (1947) (problems in negotiating with Mexico over expropriation of U.S. properties, in view of noncompliance with *Chamizal* award); FRANCIS J. WEBER, THE UNITED STATES VERSUS MEXICO: THE FINAL SETTLEMENT OF THE PIOUS FUND 42-50 (1969) (linkage between U.S. rejection of *Chamizal* and Mexico's suspension of payments under *Pious Fund* award). President Kennedy said that because of the U.S. refusal on *Chamizal*, "Mexico has been unwilling to take any other matter to arbitration, which has, of course, therefore lessened the harmony between the two countries." *See Kennedy Says U.S. Was Wrong in Mexico Border Disagreement*, N.Y. TIMES, Jul. 6, 1962, at 4, 8.

At the time of the eventual Chamizal settlement in 1963, the office of the Texas Attorney General concurred with the opinion of the Legal Adviser

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courts below uphold the U.S. obligations to carry out the ICJ's treaty interpretation.

This Court has recognized that when the United States undertakes to participate in international dispute settlement, the good faith of the United States is implicated in carrying out the result. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899). In *Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981), this Court explained that claims by nationals of one country against another can be "sources of friction" in international relations and that dispute settlement procedures accepted by the U.S. political branches are a traditional and proper method for resolving such grievances. Implementation of *LaGrand* and *Avena* is thus consistent with established jurisprudence in respect of international dispute settlement.

C. Withdrawal From The Optional Protocol Does Not Affect The U.S. Obligation To Abide By The Vienna Convention As Interpreted In *LaGrand* And *Avena*.

On March 7, 2005, the U.S. Secretary of State notified the U.N. Secretary-General that the United States "hereby withdraws" from the Optional Protocol. Under international law, this notice could not affect obligations incurred or judgments rendered while the United States was a party to the Protocol. More important for the present case, at the same time as the announcement of withdrawal from the Protocol, the United States reaffirmed its commitment to the Vienna Convention as well as its decision to comply with the *Avena* judgment.[31] It is therefore essential that domestic courts, including this Court, uphold the Convention correctly and

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of the U.S. Department of State that the matter could be resolved with Mexico by treaty without Texas's consent, because of its international implications. *See* Liss at 95-97; 3 Whiteman at 680, 696-699.

[31] The State Department spokesman said (in response to a question): "[T]he bottom line is we believe in the international system, we are committed participants in the international system, as reflected by our continued commitment to the Vienna Convention and its provisions, as well as our decision to comply with the judgment." Dep't of State Daily Press Briefing (Mar. 10, 2005), *at* http://www.state.gov/r/pa/prs/dpb/2005/43225.htm.

implement it according to the interpretation established before the U.S. withdrawal.

D. The Vienna Convention As Interpreted In *LaGrand* And *Avena* Binds The Courts And Is To Be Implemented Through Judicial Action.

LaGrand and *Avena* clarify treaty obligations of the United States which are the supreme law of the land (U.S. Const. art. VI) and binding on all state courts, and the legal obligations of the United States to abide by the interpretations in those cases likewise arise from binding treaty undertakings. Hence, on the current petitions, the interpretations in *LaGrand* and *Avena* provide the basis for the rule of decision which this Court should instruct state courts to follow.

The Senate approved the obligations of the Vienna Convention and ICJ compulsory jurisdiction over disputes under it when it gave unanimous advice and consent to ratification of the Vienna Convention and the Optional Protocol. *See* 115 Cong. Rec. 30997 (Oct. 22, 1969).[32] The Vienna Convention has been understood at all times to be a self-executing treaty.[33] Likewise, there has never been the slightest doubt that the Vienna Convention would prevail over any inconsistent state law. The priority of treaty law over state law as required by the Supremacy Clause was spelled out explicitly in the State Department's responses to the Senate's questions:

> *Question. What is the effect of the convention on (a) Federal legislation; and (b) State laws?*
>
> Answer [after explaining a possible area of conflict not relevant here].
>
> To the extent that there are conflicts with Federal legislation or State laws the Vienna

[32] *See* RESTATEMENT (Third) of the Foreign Relations Law of the United States (1987), Intro. Note to Part III and §§ 301-312, 321; Intro. Note to Part IV, ch. 6 (before § 464); § 465.

[33] The Department of State witness informed the Senate: "The Convention is considered entirely self-executive and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, reprinted in Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5. *See also* RESTATEMENT, Intro. Note before § 464.

> Convention, after ratification, would govern as in the case of bilateral consular conventions.

Sen. Exec. Rep. No. 91-9, at 18. This official response about the controlling effect of the Vienna Convention raised no concerns in the Senate, which gave unanimous advice and consent.

Because *LaGrand* and *Avena* specify what is required by the Vienna Convention itself as a remedy for breaches, all aspects of the present petitions are properly understood as implementation of self-executing treaty obligations.[34] Just as no legislation was required to implement the treaty obligation to inform foreign nationals of their consular rights, no further action from the federal political branches is needed to afford petitioners the treaty-based judicial hearing that the ICJ has found to be necessary to redress violations of this right.[35] *LaGrand* and *Avena* clarify obligations that existed when petitioners were arrested (the obligation to inform them of their treaty rights) and subsequently when they were tried, convicted, and sentenced (the treaty-based obligation to review the effect of the violation of the duty to inform and to accord an effective remedy). The procedure prescribed is well within

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[34] *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-938 (D.C. Cir. 1988), suggests in dicta that an ICJ judgment might not be self-executing, but is distinguishable. The ICJ's *Nicaragua* judgment did not involve a self-executing treaty, but rather entailed aspects of international law (use of military force) that are non-self-executing in U.S. law. The plaintiffs who sought to enforce the *Nicaragua* judgment were strangers to the ICJ case, *see* 859 F.2d 938, while *Avena* explicitly deals with petitioners' situation and specifies the remedy for their claims under a self-executing treaty. Finally, Congress and the President had repudiated the *Nicaragua* judgment in a subsequent conflicting statute, which the court of appeals found controlling, *see* 859 F.2d 936-937. Here, no statute rejects *Avena*, and the President has formally endorsed compliance through state courts. *See* Section III.

[35] In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004), this Court distinguished between rights under a treaty that the political branches have declared to be non-self-executing, and those under a self-executing treaty. Judicial enforcement of self-executing treaties is to be expected, and the same should follow for authoritative interpretations of self-executing treaties. Since the political branches have consistently treated the Vienna Convention as self-executing, *Sosa*'s reasoning favors enforcement of petitioners' treaty rights in state courts.

judicial competence to review and correct illegal acts in connection with criminal trials.

In failing to give petitioners the consular notice required by the Vienna Convention, authorities in Oregon and Virginia placed the United States in violation of its treaty obligations. The ICJ has held that an apology cannot suffice to remedy such violations in cases like those of petitioners involving "severe penalties." *See LaGrand*, para. 123; *Avena*, para. 120; Section I.B, I.D. The reparation required by the treaty is a judicial hearing for review and reconsideration of the conviction and sentence of petitioners and other similarly situated foreign nationals. Petitioners seek concrete vindication of a treaty-based right that the ICJ has found to require an effective judicial remedy. Failure to accord this treaty remedy would leave the United States in continuing violation of its obligation to ensure compliance with the Vienna Convention.

There can be no objection that *Avena* calls upon the United States to alter the way in which state criminal jurisdiction would be exercised.[36] Treaties often require states to modify the exercise of jurisdiction, and even to refrain from criminal jurisdiction. For example, the Vienna Convention (arts. 41-45)

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[36] If U.S. states were free to violate and then fail to remedy treaty violations, with no judicial remedy available, the United States as a whole would be responsible for state violations of international law. This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as a whole. *See, e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). The United States has accepted obligations to make reparations in respect of failure of state or local authorities to protect foreign nationals in accordance with international standards. *See* RESTATEMENT § 207, Reporters' Note 3. Where state courts can avoid such violations by carrying out the judgment of an authoritative international tribunal, they must do so.

In the early 20th century, in preparation for arbitration with Mexico involving protection of nationals of one country in the other's territory, State Department lawyers sought instructions on how to deal with legal issues concerning actions of states of the Mexican federation, in light of mirror-image considerations of U.S. federalism. The Department replied that "in our dealings with foreign Governments having a federal system similar to our own, we have invariably insisted on the liability of the Federal Government." 5 Hackworth 593, 597 (1943).

codifies the international law of consular immunity from criminal jurisdiction. Where a treaty provides for immunity of a foreign official, courts are required to recognize immunity, notwithstanding any impact on law enforcement interests. *See Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983) (criminal complaint against consul dismissed because of Vienna Convention). *Cf. In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Cal. 1854) (recognizing treaty immunity of consul from defendant's subpoena in a criminal case, notwithstanding constitutional guarantee of compulsory process to obtain witnesses).

The obligation of state judges to give effect to treaty-based rights of foreigners is beyond doubt. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796), this Court established that a treaty with Britain would prevail over state laws confiscating the property of British subjects:[37]

> [I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to the treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.

State courts have frequently upheld treaty rights in cases coming within their jurisdiction, without awaiting any instruction from the federal Executive or the legislature.[38]

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[37] *See also Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (treaty protected British property owners against forfeiture under state law). Treaties providing inheritance rights for aliens have been held to prevail over state laws. *See Hauenstein v. Lynham*, 100 U.S. 483 (1880); *Nielsen v. Johnson*, 279 U.S. 47 (1929); *Clark v. Allen*, 331 U.S. 503 (1947); *Kolovrat v. Oregon*, 366 U.S. 187 (1961). State prohibitions on land ownership have likewise had to yield to treaties. *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817). In *Asakura v. Seattle*, 265 U.S. 332 (1924), this Court said: "The treaty is binding within the State of Washington. ... It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." 265 U.S. at 341.

[38] The Court of Appeals of Kentucky, in an opinion that this Court called "very able" (*United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), wrote in a treaty case:

> When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be

(Cont'd)

Indeed, state courts have regularly applied consular treaties on a self-executing basis. *See, e.g., In re Zalewski*, 292 N.Y. 322 (1944) (holding a consular treaty to be supreme law and giving it liberal construction to allow consul to act as agent for Polish national and exercise right of election under will).

Where the Senate unanimously approved a treaty designed to secure rights of Americans around the world and the ICJ has required review and reconsideration of convictions and sentences as the remedy for violation, no state court is free to ignore the treaty-based judgment in favor of the foreigner. If Oregon and Virginia were to defeat the national interest in treaty compliance, they would deny to the United States as a whole the benefits of the constitutional design, which makes treaty obligations supreme and requires state courts to enforce them.[39]

III. This Court Should Treat *LaGrand* And *Avena* As The Basis For The Rule Of Decision For State Courts, Without Regard To Executive Branch Positions Incompatible With The ICJ's Interpretation.

A. *LaGrand* And *Avena* Establish The Basis For The Rule Of Decision Applicable In All Vienna Convention Cases Involving "Severe Penalties."

Although *LaGrand* and *Avena* were brought on behalf of death row inmates, Vienna Convention obligations are not

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(Cont'd)

> disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878).

[39] In *Hines v. Davidowitz*, 312 U.S. 52 (1941), this Court emphasized:

> One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. . . . – duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad.

312 U.S. at 64-65.

limited to capital crimes, nor does the obligation to afford a remedy for treaty violations apply only in capital cases. The import of *LaGrand* and *Avena* extends beyond the two LaGrand brothers and the 51 named individuals in *Avena*: *LaGrand* and *Avena* have stated an authoritative interpretation of the underlying treaty which establishes the rule for deciding comparable questions under the same treaty henceforth. (Section I.D.)

Amici understand the position of respondents to be that by virtue of Article 59 of the ICJ Statute,[40] *LaGrand* and *Avena* are not binding in respect of Mr. Sanchez-Llamas (whose case was not before the ICJ in *Avena*) or Mr. Bustillo (whose country has not participated in ICJ dispute settlement under the Optional Protocol). The United States as *amicus curiae* in *Medellin* took positions that would confine the international legal obligation flowing from *Avena* to the specific dispositive provisions of that judgment, and the domestic legal obligation to President Bush's memorandum on compliance with *Avena*.[41] These litigation positions misconstrue the nature of ICJ adjudication in cases of treaty interpretation and fail to recognize the authority attaching to ICJ decisions, not only in the jurisprudence of that body, but also for national courts.

Article 59 of the ICJ Statute reflects the well-understood position that the ICJ does not have a formal rule of *stare decisis*, while affirming the *res judicata* effects of the judgment in respect of the matter decided. Even without *stare decisis*, the reality is that once the ICJ has decided the merits of a question of international law, that decision is authoritative when corresponding questions arise later on. The ICJ "has, indeed, never expressly departed from a previous

[40] Article 59 provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[41] *See* Brief for the United States as Amicus Curiae Supporting Respondent, *Medellin v. Dretke*, 125 S.Ct. 2088, pp. 38-39 n. 12 (on international legal obligation to comply with judgment but not with its reasoning); Brief for the United States as Amicus Curiae, *Ex Parte Medellin* (Ct. Crim. App. TX, Sept. 2, 2005), p. 18 n. 2. Both U.S. amicus briefs take the position that *Avena* has no domestic force except to the extent implemented by the President's memorandum of February 28, 2005. *Amici* respectfully disagree and urge this Court to apply *Avena* as the treaty-based rule of decision, for the reasons set forth herein.

decision."[42] Not only does the ICJ follow its own precedents,[43] but this Court has taken ICJ judgments as authoritative articulations of rules of international law,[44] as have other national tribunals,[45] even in matters concerning internal criminal jurisdiction.[46]

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[42] *See* Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 81 (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996); *see also* E.W. Vierdag, *The International Court of Justice and the Law of Treaties*, *in ibid.* at 145, 154 ("great care is always taken to demonstrate the internal consistency of the Court's jurisprudence.").

[43] *See generally* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 26-31, 40-47, 63-65, 99-102 (1996) (on jurisprudential basis for ICJ reliance on own precedents); 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 1627-1635 (1997) (on precedential effects beyond art. 59).

[44] *See, e.g.*, *United States v. Maine*, 475 U.S. 89 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985); *United States v. Louisiana*, 394 U.S. 11 (1969) (all referring to the *Fisheries* case (U.K. v. Nor.), 1951 I.C.J. 116, as legal authority in a maritime boundary dispute).

[45] *See generally* Sarita Ordonez & David Reilly, *Effect of the Jurisprudence of the International Court of Justice in National Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 335, 352-369 (Thomas M. Franck & Gregory H. Fox eds., 1996) (invocation of ICJ cases by courts in Argentina, Canada, France, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, U.K. and U.S., and colonial and consular courts); *see also* Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, *in ibid.* at 21, 30-35; CHRISTOPH C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 33-34, 74, 86, 92, 98, 129-130, 199, 204, 221, 257-258 (1981) (similar).

[46] After the ICJ decision in *Arrest Warrant of 11 April 2000* (D.R. Congo v. Belg.), 2002 ICJ 3, holding that Belgium was required to cancel an arrest warrant for the sitting foreign minister of the Congo, Belgian courts not only cancelled the specific warrant involved in the case but also dismissed proceedings involving high-level officials of other states. Belgium's Supreme Court, acting in a case involving Prime Minister Ariel Sharon of Israel, followed *Arrest Warrant* in finding the head of government to enjoy immunity under international law. *See* Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003); *see also* Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-07 (2003) (Belgian court decisions terminating prosecutions in *Yerodia*, *Sharon*, *and Gbagbo* following ICJ ruling altered outcomes from what advocates had expected under preexisting understandings of legal doctrine and legislative intent).

When the ICJ interprets a multilateral treaty, as it has done in *LaGrand* and *Avena*, its decision addresses the objective meaning of the treaty, which necessarily must apply throughout the treaty space and not as some special rule between litigants.[47] In the first case ever brought to the ICJ under the Vienna Convention, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), the United States insisted - and the ICJ underscored in its judgment - that the import of the case transcended U.S.-Iranian bilateral relations and involved community-wide interests under the treaties involved.[48] In *Avena* (para. 47), the ICJ referred to the *Tehran Hostages* case in the context of affirming that the Vienna Convention "lays down certain standards to be observed by all States parties," and explained later in the judgment (para. 151) that nationals of all states parties are entitled to enjoy the rights and remedies elaborated therein.

B. This Court Should Decide The Meaning And Effect Of The Vienna Convention In Light Of *LaGrand* And *Avena*, Even If That Decision Differs From The Positions Of The Executive Branch.

Up through the merits phase of *Avena*, the United States maintained certain international and domestic litigation positions that have now been definitively rejected in *Avena*. To the extent that the lower courts may have acted on assumptions that are now known to be inconsistent with

[47] *See* Bedjaoui, *supra* n. 45, at 27 ("Going by the rule, Article 59 confines the effects of this interpretation to relations between the litigant States alone. But in reality, it is virtually impossible for all the parties to a multilateral convention (which may even be a universal one) to ignore the Court's interpretation of this convention for long."). *See also* Rosenne, *supra* n. 43, at 1635 (quoting *Aegean Sea Continental Shelf*, 1978 ICJ 3, 16, that "any pronouncement of the Court as to [the 1928 General Act for the Pacific Settlement of Disputes] may have implication in the relations between States other than [the parties]."). Because ICJ interpretations of multilateral treaties inevitably bear upon other treaty parties beyond the specific disputants, Article 63 of the ICJ Statute instructs the ICJ to notify all other parties to the treaty who then can intervene in the case as of right.

[48] *See, e.g.*, 1979 ICJ Pleadings, *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), pp. 11-12, 23-24, 169-170; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 19-20 (Provisional Measures); 1980 ICJ 3, 42-43 (Merits).

the treaty obligations of the United States, this Court should instruct those courts to follow *Avena* and not to follow any Executive Branch positions incompatible with *Avena*.

President Bush's memorandum on compliance with *Avena* acknowledges the party status of the United States to the relevant treaties and the jurisdiction of the ICJ to decide the dispute; further acknowledges the existence of international obligations for the United States under *Avena*; and provides that compliance in state courts will discharge those obligations. Although the litigation position of the Executive Branch seeks to confine the import of the determination to the 51 individuals covered *Avena*, this Court should recognize that the same treaty-based rule of decision applies in petitioners' cases as well. (Sections I.D, III.A.)

Bearing in mind that the views of the Executive on treaty matters are entitled to deference but are "not conclusive upon a court called upon to construe such a treaty in a manner involving personal rights," *see, e.g., Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Perkins v. Elg*, 307 U.S. 325 (1939), this Court should endorse the Executive's views that are compatible with protecting foreign nationals in accordance with *Avena* but not follow Executive positions that would give foreign nationals a lesser level of protection than they are entitled to enjoy under *Avena*'s interpretation of the Vienna Convention.[49] This Court has consistently reserved to the judiciary the prerogative of *protecting* the personal rights claimed by individuals under treaties beyond the Executive position and has never been known to *restrict* a treaty right that the Executive has acknowledged or that is otherwise ascertainable as a matter of objective treaty interpretation. *Cf. Factor v. Laubenheimer*, 290 U.S. 276 (1933) (interpretation expanding rather than restricting treaty rights is to be preferred); *Valentine v. United States ex*

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[49] No issue is raised here of deferring to Executive foreign policy, apart from the federal policy favoring treaty compliance in general and compliance with *Avena* in particular. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677, 701-701 (2004) (on deference to the Executive for case-specific foreign policy reasons).

rel. Neidecker, 299 U.S. 5, 10-11 (1936) (rejecting claim of Executive power as unsupported by treaty); *Baker v. Carr*, 369 U.S. 186, 212 (1962) (courts must resolve conflicts with state law in favor of treaty compliance).

The jurisprudence of this Court accepts the authority of the federal government to settle disputes with foreign governments in a manner that binds state courts. In *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), this Court found that the federal policy of the United States adopted in the context of definitive resolution of disputes with the Soviet Union would displace contrary state law. In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court confirmed that an executive policy in favor of achieving "legal peace" with foreign governments had to prevail over a state law affecting the jurisdiction of state courts.[50] Whatever might be the limits of federal authority to resolve disputes with foreign governments in some hypothetical scenario not involved here,[51] it falls clearly within the core of federal power under the Constitution to accept the outcome of a treaty-based dispute resolution process as definitively settling a dispute over treatment of foreign nationals by the states and for this Court to ensure that state courts carry out the treaty obligations in question.

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[50] *See also Dames & Moore v. Regan*, 453 U.S. 654, 679-680 (1981) (upholding executive power to settle claims through international dispute mechanism). In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 383 (2000), this Court invalidated a state law that had embroiled the national government for some time in an international dispute settlement procedure. *A fortiori*, in the face of a binding judgment from treaty-based dispute settlement, a state rule must not impede treaty compliance and a judicial remedy must be available.

[51] No question is presented here of constitutional rules on expenditures from the Treasury, or of statutory restrictions on acceptance of a particular dispute settlement procedure or explicit limitations on the effects of a dispute settlement ruling within the U.S. legal system. *Cf., e.g.*, Uruguay Round Agreements Act, 19 U.S.C. §§ 3501, 3512(b)(2) (restricting legal challenges to state laws in relation to dispute settlement procedures of World Trade Organization).

Ultimately, it is the interpretation of this Court that must have conclusive effect under the Constitution.[52] In interpreting the legal obligations of the United States in the instant case, it would be no mark of disrespect to the Executive Branch, but a justified assertion of the role of this Court consistent with the principle of separation of powers, if the Court, as *Amici* urge, exercises its independent judgment to accept the interpretation embodied in *LaGrand* and *Avena*.

CONCLUSION

Amici urge this Court to ensure that actions and omissions of the States of Oregon and Virginia are remedied by the courts of those States, as proper organs of treaty compliance. Refusal to grant the treaty-based remedy for Vienna Convention violations as determined by the ICJ would undermine the U.S. ability to insist on compliance by other states with their obligations under the Vienna Convention. Review and reconsideration of petitioners' convictions and sentences is necessary to avoid the adverse consequences that would result from failure to comply, which could include prejudice in connection with dispute settlement under other treaties.

By remanding with instructions to afford the remedy of review and reconsideration required to redress the violation of the treaty as interpreted in *LaGrand* and *Avena*, this Court will fulfill its responsibility within our constitutional system and will maintain compliance with the international obligations of the United States.

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[52] *See* Restatement, § 112(2) ("The determination and interpretation of international law present federal questions and their disposition by the United States Supreme Court is conclusive for other courts in the United States") and comment *a*.

Respectfully submitted,

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Appendix

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Appendix

Stephen M. Schwebel was a judge of the International Court of Justice from 1981 to 2000 and its president from 1997 to 2000. Previously he served for fourteen years in the Office of the Legal Adviser of the U.S. Department of State, including as Assistant Legal Adviser and Deputy Legal Adviser, in which offices he represented the United States in the *Certain Expenses of the United Nations* advisory opinion proceeding, 1962 ICJ 163; *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 ICJ 7, 1980 ICJ 3; and in the advisory opinion proceeding on *Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt*, 1980 ICJ 73.

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In the Supreme Court of the United States

MOISES SANCHEZ-LLAMAS
Petitioner,

v.

OREGON

MARIO A. BUSTILLO
Petitioner,

v.

GENE M. JOHNSON,
DIRECTOR VIRGINIA DEPT. OF CORRECTIONS

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

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INTEREST OF AMICI CURIAE

Amici curiae respectfully submit this brief addressing the question whether the Vienna Convention on Consular Relations creates individually enforceable rights. Amici are professors of law whose areas of expertise include international law, federal courts, and U.S. foreign relations law. We have an interest in providing this Court with an historical perspective on the judicial enforcement of treaties in U.S. courts. Amici are listed in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

Article 36(1) of the Vienna Convention on Consular Relations (VCCR) protects the primary rights of individuals. Under the Supremacy Clause, state courts are bound to enforce the treaty on behalf of individuals whose primary rights are violated. Analysis of Supreme Court decisions in the first forty years of U.S. constitutional history shows that the Framers believed that courts do not need express authorization from the political branches to provide individual remedies for violations of treaty rights. In accordance with the Framers' original understanding, individual defendants like Mr. Sanchez-Llamas have the capacity to invoke a treaty before a domestic court if they were harmed by a violation of their treaty-based primary rights, even if the treaty at issue is silent with respect to domestic judicial remedies. Similarly, individual plaintiffs have the capacity to invoke a treaty before a domestic court if domestic law grants them a right of access to court (as the

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[1] The parties' letters of consent to the filing of amici briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, amici curiae state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amici, their members, or their counsel, has made a monetary contribution for preparing or submitting this brief.

Virginia habeas statute does for Mr. Bustillo) and they were harmed by a violation of their treaty-based primary rights, even if the treaty at issue is silent with respect to domestic judicial remedies.

In *State v. Sanchez-Llamas*, the Oregon Supreme Court adopted a presumption that individual litigants cannot obtain remedies for treaty violations unless the treaty itself creates a private right of action. That presumption is contrary to the Framers' original understanding of the judiciary's role in treaty enforcement. Between 1789 and 1829, this Court decided 34 cases in which an individual litigant raised a claim or defense on the basis of a treaty. In every case where the Court found a violation of an individual's treaty-based primary right – a total of 18 cases – the Court granted a remedy. In two of those 18 cases, the individual sued to enforce a treaty that created an express private right of action. In the other 16 cases, though, the Court awarded a remedy even though the treaty at issue did not create a private right of action. This consistent pattern of Supreme Court decisions during the first forty years of U.S. constitutional history provides powerful evidence of the Framers' views. These cases demonstrate that the presumption adopted by the Oregon Supreme Court is contrary to the Founders' original understanding of the judiciary's role in treaty enforcement.

The Oregon Supreme Court's presumption against judicial remedies for treaty violations is also squarely at odds with two centuries of consistent Supreme Court jurisprudence. For more than two hundred years, this Court has consistently granted judicial remedies in cases where a treaty protects an individual's primary rights and those treaty rights have been violated. In fact, this Court has never denied a judicial remedy to an individual whose treaty rights

were violated, except in cases where Congress enacted a statute that superseded the treaty under the later-in-time rule.

There is no dispute that Article 36 of the VCCR is the Law of the Land under the Supremacy Clause. Moreover, it is evident from the plain meaning of Article 36 that the treaty protects the primary rights of individuals. Therefore, this Court should hold that any individual who has been harmed by a violation of his primary rights under Article 36 is entitled to a judicial remedy for that violation, except insofar as amendments to the federal habeas statute enacted after ratification of the VCCR may preclude the availability of federal habeas relief for some petitioners who would otherwise be entitled to a judicial remedy.

ARGUMENT

I. DECISIONS IN TREATY CASES FROM 1789 TO 1829 SUPPORT A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REMEDIES FOR VIOLATIONS OF INDIVIDUAL TREATY RIGHTS

Treaties frequently create primary rights for individuals. For the purpose of this brief, an individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. *See generally* Henry M. Hart, Jr. & Albert M. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Eskridge & Frickey, eds. 1994), at 130-31 (defining primary duties), and at 136-37 (noting that a "primary right" is "the mere obverse" of a duty). Treaties rarely, though, explicitly address the question whether individuals have a private right of action – that is, a right of access to domestic courts. Similarly, treaties usually

do not explicitly address the question whether individuals have the power to invoke the treaty before a domestic court.

The Oregon Supreme Court assumed that individuals cannot enforce their primary rights under the VCCR unless the Convention itself creates a private right of action. *See State v. Sanchez-Llamas*, 108 P.3d 573, 575-78 (Or. 2005). That assumption is clearly mistaken. In the statutory context, the Administrative Procedure Act (APA) creates a private right of action that authorizes individual suits to enforce federal statutes that do not themselves create a private cause of action. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (where plaintiffs sued to enforce a statute that did not create a private right of action, Justice Scalia, writing for a unanimous court, held that "[t]he APA authorizes suit" for federal statutory violations "[w]here no other statute provides a private right of action"). Similarly, Virginia's habeas corpus statute grants Mr. Bustillo a private right of action to advance his claim "that he is detained without lawful authority," Va. Code § 8.01-654, and the Supremacy Clause requires the Virginia courts to apply the VCCR as a rule of decision to decide the merits of that claim. (Since Mr. Sanchez-Llamas is a defendant in a criminal proceeding, the question of a right of action does not arise because he was haled into court against his will.)

Between 1789 and 1829, this Court consistently granted remedies to individuals who were harmed by violations of their treaty-based primary rights, despite the fact that the treaties at issue did not create private rights of action and did not expressly empower individuals to invoke the treaties before a domestic court. During this period, the Court decided 34 cases in which an individual litigant raised

a claim or defense on the basis of a treaty.[2] All 34 cases are consistent with the following rule: if an individual was harmed by a past violation of his primary treaty rights, or if he is likely to be harmed by a future violation of those rights, then the individual is entitled to a judicial remedy, even if the treaty itself does not create a private right of action, and even if the treaty says nothing about the capacity of individuals to invoke the treaty before a domestic court. This rule is a corollary of the principle endorsed by the Supreme Court in *Marbury v. Madison* "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded." 5 U.S. 137, 163 (1803) (quoting Blackstone's Commentaries). If a particular treaty provision is the Law of the Land under the Supremacy Clause, and that provision protects primary individual rights, the *Marbury* principle establishes a strong presumption that individuals who are harmed by a violation of their treaty-based primary rights are entitled to domestic judicial remedies. *See Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809) (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

Part One of this brief demonstrates that all 34 treaty cases decided by the Supreme Court between 1789 and 1829 are consistent with the *Marbury* principle. These consistent precedents in the Framing Period provide particularly powerful evidence of the Framers' views concerning the judiciary's role in the enforcement of treaties. This Court has emphasized that the force of constitutional precedents "tends

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[2] This figure does not include cases involving treaties with Indian tribes.

to increase in proportion to their proximity to the Convention in 1787." *Powell v. McCormack*, 395 U.S. 486, 547 (1969). In the case of treaties, the consistent precedents of this Court in the initial decades of the Constitution demonstrate with clarity the contemporaneous understanding that it is the judiciary's responsibility to provide remedies for individuals who are harmed by violations of their treaty-based primary rights. Moreover, in cases where a court has jurisdiction, the court does not need express authorization from the political branches – either in the form of a federal statutory right of action, or in the form of an express private right of action in the treaty – to provide judicial remedies for violations of individual treaty rights, because it is the judiciary's responsibility within our system of divided government to supply the remedy for violations of treaty-based primary rights.

For ease of analysis, Part One divides the 34 treaty cases decided by the Supreme Court between 1789 and 1829 into four groups: twelve cases where the plaintiff invoked a treaty and prevailed on the basis of the treaty; six cases where the defendant invoked a treaty and prevailed on the basis of the treaty; ten cases where the party invoking the treaty lost on the merits of the treaty claim; and six cases that do not fit into any of the other categories.

A. This Court Regularly Granted Remedies to Plaintiffs in Cases Where the Treaty at Issue Did Not Create a Private Right of Action

Between 1789 and 1829, this Court decided twelve cases in which an individual plaintiff secured a remedy for a violation of a treaty-based primary right. In two of those cases, the treaty at issue granted the plaintiff a private right of action. *See The Bello Corrunes*, 19 U.S. 152 (1821)

(restoring ship and cargo to Spanish shipowners because ship was captured in violation of bilateral treaty between U.S. and Spain); *The Pizarro*, 15 U.S. 227 (1817) (awarding restitution to Spanish claimants because ship was seized in violation of bilateral treaty between U.S. and Spain).[3]

In the other ten cases, though, the plaintiff brought suit on the basis of a domestic right of action, and the treaty provided a primary rule for deciding the merits of the claim. *See Hughes v. Edwards*, 22 U.S. 489 (1824) (suit to foreclose on mortgage); *Soc'y for Propagation of Gospel v. New Haven*, 21 U.S. 464 (1823) (action for ejectment); *Craig v. Radford*, 16 U.S. 594 (1818) (equitable action to divide a tract of land); *Chirac v. Lessee of Chirac*, 15 U.S. 259 (1817) (action for ejectment); *Fitzsimmons v. Newport Ins. Co.*, 8 U.S. 185 (1808) (suit for breach of contract); *Higginson v. Mein*, 8 U.S. 415 (1808) (suit to foreclose on mortgage); *Hopkirk v. Bell*, 7 U.S. 454 (1806) (suit to recover payment on bond); *Ogden v. Blackledge*, 6 U.S. 272 (1804) (suit to recover payment on bond); *United States v. The Schooner Peggy*, 5 U.S. 103 (1801) (libel in admiralty court); *Ware v. Hylton*, 3 U.S. 199 (1796) (suit to recover payment on bond). These cases are analogous to *Bustillo v. Johnson*, because Mr. Bustillo brought suit on the basis of Virginia's habeas

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[3] In both *Bello Corrunes* and *Pizarro*, the Spanish claimants had an express private right of action under the Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, art. 20, U.S.-Spain, *reprinted in* 2 Treaties and Other International Acts of the United States of America 318, 334-35 (Hunter Miller ed., 1931) [hereinafter, "1795 Treaty with Spain"] ("It is also agreed that the inhabitants of the territories of each party shall respectively have free access to the Courts of Justice of the other, and they shall be permitted to prosecute suits for the recovery of their properties . . . and for obtaining satisfaction for the damages which they may have sustained . . . ").

statute, and the VCCR provides a primary rule for deciding the merits of his claim.

In each of the ten cases cited above, where the plaintiff brought suit on the basis of a domestic right of action, the Court applied the relevant treaty provision as a rule of decision in the case, despite the fact that the treaty at issue did not create a private right of action. In none of these ten cases did the treaty expressly empower the plaintiff to invoke the treaty before a domestic court. Nevertheless, in each case the Court awarded the plaintiff a remedy because he had been harmed by a past violation of a primary treaty right, or was likely to be harmed by a future violation of a primary treaty right. *See Hughes*, 22 U.S. 489 (ordering foreclosure and sale of mortgaged property to secure individual property right protected by article 9 of Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, art. 9, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 245, 253-54 (Hunter Miller ed., 1931) [hereinafter, "Jay Treaty"]; *Soc'y for Propagation of Gospel*, 21 U.S. 464 (ordering restoration to plaintiff of land that had been wrongfully expropriated by state legislative act in violation of article 6 of the Definitive Treaty of Peace, Sept. 3, 1783, art. 6, U.S.-Great Britain, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 151, 155 (Hunter Miller ed., 1931)); *Craig*, 16 U.S. 594 (ordering defendants to convey land to plaintiff because defendants had wrongfully appropriated land in violation of article 9 of Jay Treaty); *Chirac*, 15 U.S. 259 (invalidating Maryland law and restoring property rights of French plaintiffs because state had wrongfully terminated those rights in violation of article 7 of the Convention Between the French Republic and the United States of America, Sept. 30, 1800, art. 7, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 457, 462-63 (Hunter Miller ed.,

1931) [hereinafter, "1800 Convention"]; *Fitzsimmons*, 8 U.S. 185 (ordering insurance company to make contractual payment to insured because British prize court had wrongfully condemned the insured ship, in violation of article 18 of Jay Treaty); *Higginson*, 8 U.S. 415 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 5 of the Definitive Treaty of Peace); *Hopkirk*, 7 U.S. 454 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace); *Ogden*, 6 U.S. 272 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace); *The Schooner Peggy*, 5 U.S. 103 (ordering restoration of ship to French owner, as required by article 4 of the 1800 Convention); *Ware*, 3 U.S. 199 (ordering debtor to pay debt wrongfully withheld from creditor in violation of article 4 of the Definitive Treaty of Peace).

In sum, this Court's decisions during this period support a strong presumption that an individual who was harmed by a past violation of his treaty-based primary rights, or is likely to be harmed by a future violation of those rights, is entitled to a judicial remedy, even if the treaty at issue does not create a private right of action or expressly empower the individual to invoke the treaty before a domestic court.

B. This Court Regularly Awarded Judgment for Defendants in Cases Where the Treaty Did Not Expressly Empower Individuals to Invoke the Treaty

Between 1789 and 1829, this Court decided six cases in which an individual defendant secured a judgment to protect a primary treaty right. In each of these six cases, the Court applied the relevant treaty provision as a rule of decision, despite the fact that the treaty at issue did not expressly empower the defendant to invoke the treaty before

a domestic court. In each of the six cases, the rationale supporting judgment for the defendant relied, at least in part, on the Court's assessment that a judgment for the plaintiff would have infringed upon the defendant's treaty-based primary rights. *See Carneal v. Banks*, 23 U.S. 181 (1825) (where plaintiff sued to rescind contract for land swap, claiming that defendant did not have valid title to land, Court dismissed bill for rescission because defendant derived title from French citizen whose right to hold land in U.S. territory was protected under article 11 of Treaty of Amity and Commerce, Feb. 6, 1778, art. 11, U.S.-France, *reprinted in* 2 Treaties and Other International Acts of the United States of America, 3, 11-12 (Hunter Miller ed., 1931) [hereinafter "1778 Treaty with France"); *Orr v. Hodgson*, 17 U.S. 453 (1819) (where plaintiff sued to rescind contract for purchase of land, challenging validity of defendant's title, Court dismissed bill for rescission because defendant had valid title protected by article 6 of Definitive Treaty of Peace and article 9 of Jay Treaty); *Jackson v. Clarke*, 16 U.S. 1 (1818) (where plaintiff sued for ejectment, Court dismissed suit because article 9 of Jay Treaty protected rights of British citizens to hold and inherit land); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1813) (where plaintiff sued for ejectment, Court dismissed suit because defendant's title to land was secured by article 9 of Jay Treaty); *Moodie v. The Ship Phoebe Anne*, 3 U.S. 319 (1796) (where British consul filed libel to recover ship captured by French privateer, Court awarded judgment to French privateer because article 19 of 1778 Treaty with France protected right of French citizens to enter U.S. ports and obtain items necessary for repairs); *Georgia v. Brailsford*, 3 U.S. 1 (1794) (where State of Georgia brought suit, asserting entitlement to pre-war debt owed to British citizen, Court held that article 4 of Definitive Treaty of Peace protected British defendant's right to recover debt).

In none of these cases did the treaty at issue expressly empower the defendant to invoke the treaty as a defense in a judicial proceeding. The absence of any such treaty provision, however, did not preclude individual enforcement of the treaty. To the contrary, the Court applied the presumption that an individual defendant who has been harmed by a violation of his primary treaty rights, or is likely to be harmed by a future violation of those rights, has the capacity to invoke the treaty and is entitled to a judicial remedy. Since Mr. Sanchez-Llamas is also a defendant in a judicial proceeding, like the defendants in the cases cited above, he has the capacity to invoke the VCCR as a defense, and he is entitled to a judicial remedy, if he was harmed by a violation of his treaty-based primary rights.

C. The Cases Where Treaty Claimants Lost Are Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

Of the 34 treaty cases decided by this Court between 1789 and 1829, there were ten cases where the party invoking the treaty lost on the merits. In none of those cases, however, did the Court rule that the treaty was not judicially enforceable. Rather, in each case, the party invoking the treaty lost on the merits, either because the treaty did not grant that party the primary right he asserted, or because there was no violation of that right. *See Foster v. Neilson*, 27 U.S. 253 (1829) (where plaintiffs claimed title to land on the basis of article 8 of Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, U.S.-Spain, *reprinted in* 3 Treaties and Other International Acts of the United States of America, 3, 9 (Hunter Miller ed., 1933) [hereinafter "Florida Treaty"], Court held that treaty did not grant plaintiffs title to disputed property); *Comegys v. Vasse*, 26 U.S. 193 (1828) (where arbitral commission established pursuant to Florida Treaty

awarded money judgment to creditors of bankrupt person, treaty did not grant bankrupt party right to recover judgment from creditors); *De la Croix v. Chamberlain*, 25 U.S. 599 (1827) (Florida Treaty protected plaintiff's inchoate title to land, but inchoate title was insufficient to permit plaintiff to recover land in action for ejectment); *Blight's Lessee v. Rochester*, 20 U.S. 535 (1822) (plaintiffs, who claimed title to land by descent from British citizen, lost on merits because title of British citizen was not protected by Jay Treaty or by Definitive Treaty of Peace); *The Amiable Isabella*, 19 U.S. 1 (1821) (Spanish claimant, who invoked article 17 of 1795 Treaty with Spain, lost on merits because treaty did not grant him the immunity he claimed); *The Nuestra Senora de la Caridad*, 17 U.S. 497 (1819) (Spanish shipowner, who invoked 1795 Treaty with Spain, lost on merits because treaty did not protect goods from capture); *The Nereide*, 13 U.S. 388 (1815) (American privateer, who invoked article 15 of 1795 Treaty with Spain, lost on merits because law of nations protected cargo from capture and treaty did not alter law of nations in that respect); *Smith v. Maryland*, 10 U.S. 286 (1810) (defendant, who invoked article 6 of Definitive Treaty of Peace, lost on merits because treaty provision protecting land from confiscation did not apply to subject property); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. 209 (1808) (where defendant asserted that Definitive Treaty of Peace deprived plaintiff of property rights, Court rejected argument on merits and affirmed plaintiff's title to land); *Glass v. The Sloop Betsey*, 3 U.S. 6 (1794) (where French privateer contended that article 17 of 1778 Treaty with France barred District Court's exercise of jurisdiction in prize case, Court ruled that treaty did not deprive District Court of jurisdiction, and remanded case for adjudication on merits).

In sum, none of these cases support a presumption against individual enforcement of treaties. To the contrary, the cases merely support the unremarkable proposition that

an individual whose primary rights are not protected by a treaty cannot obtain a remedy on the basis of that treaty.

D. Other Cases From This Period Are Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

In addition to the cases discussed above, this Court decided six other cases between 1789 and 1829 in which an individual litigant raised a claim or defense on the basis of a treaty. In two of those cases, the Court did not rule on the merits of the treaty claim. *See Harden v. Fisher*, 14 U.S. 300 (1816) (remanding case to circuit court for additional factfinding); *United States v. Lawrence*, 3 U.S. 42 (1795) (dismissing mandamus petition directed against a federal judge because the judge acted within the scope of his discretionary authority). In two other cases, the Court did not apply the treaty as a rule of decision, but merely consulted the treaty as an aid to construing some other provision of law, which provided the rule of decision in the case. *See Henderson v. Poindexter's Lessee*, 25 U.S. 530 (1827) (prevailing plaintiff, whose title to land did not depend on treaty, invoked Definitive Treaty of Peace and 1795 Treaty with Spain to establish that defendant's land grant from Spanish government was void because land was part of United States at time of Spanish grant); *Harcourt v. Gaillard*, 25 U.S. 523 (1827) (prevailing defendant, whose title to land did not depend on treaty, invoked Definitive Treaty of Peace to establish that plaintiff's grant from British governor was void because land was part of United States at time of British grant). In one case, each of the opposing parties invoked a different treaty in support of its case. *See Talbot v. Janson*, 3 U.S. 133 (1795) (rejecting captor's argument that treaty between U.S. and France deprived District Court of jurisdiction, and ruling in favor of Dutch shipowner on the

basis of a treaty between U.S. and Netherlands). These five cases neither support nor refute the presumption in favor of judicial remedies for violations of individual treaty rights.

The only other treaty case during this period was *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809), which involved a dispute related to land in Maryland. The original owner of the land mortgaged the property to Scarth, a British citizen. In 1732, Waters obtained a judgment of condemnation against the land for a debt due to him from Scarth, but Waters never executed the judgment. *Id.* at 344. Owings, a Maryland citizen, derived his claim to the land from Waters. In 1780, Maryland confiscated all property in the state belonging to British subjects. *Id.* at 346. The plaintiff had a patent from the State of Maryland, issued in 1800. *Id.* at 344. Plaintiff sued to eject Owings. In response, Owings invoked article 5 of the Definitive Treaty of Peace, which protected the rights of British citizens whose property was confiscated during the Revolutionary War. The Court's central holding was that it lacked jurisdiction because the case did not "arise under" a treaty. *Id.* at 347-48.

The case did not arise under a treaty because Owings, who invoked the treaty, did not have any property rights protected by the treaty. In contrast, Scarth's heirs, who were British citizens, did have property rights protected by the treaty, because Scarth's mortgage was confiscated during the war. Thus, "if Scarth or his heirs had claimed, it would have been a case arising under a treaty," because Scarth's mortgage was protected from confiscation by article 5 of the treaty. *Id.* at 348. In sum, *Owings* anticipates the modern rule that individuals lack standing to enforce the rights of unrelated third parties. Owings could not assert Scarth's treaty rights because he was not Scarth's heir or successor-in-interest. But Justice Marshall left no doubt that Scarth's heirs could have invoked the Definitive Treaty of Peace,

despite the fact that the treaty itself did not expressly grant them the power to invoke the treaty as a defense in an action for ejectment.

E. *Foster* is Consistent with the Presumption in Favor of Judicial Remedies for Violations of Individual Treaty Rights

The Oregon Supreme Court cited *Foster v. Neilson*, 27 U.S. 253 (1829) in support of the proposition that there is "a presumption against the creation of individual, judicially enforceable rights" by means of treaties. *State v. Sanchez-Llamas*, 108 P.3d 573 (Or. 2005). In fact, *Foster* is entirely consistent with the approach reflected in the other treaty cases decided by the Supreme Court during this period, which applied a strong presumption in favor of judicial remedies for violations of individual treaty rights.

Foster involved a dispute over title to land in Louisiana. The land at issue was part of a large area that was the subject of a political dispute between the United States and Spain between 1803, when the United States acquired Louisiana from France, and 1819, when the U.S. purchased Florida from Spain. *See Foster*, 27 U.S. at 300-310. During that period, Spain asserted that the land east of the Mississippi river and south of thirty-one degrees latitude was a part of Florida, which belonged to Spain. The United States, in contrast, asserted that the disputed territory was part of Louisiana, which the U.S. had acquired from France. The plaintiffs in *Foster* traced their title to an 1804 land grant from the Spanish governor of Florida. *See id.* at 253-55. The Court in *Foster* held that the plaintiffs could not establish a valid title on the basis of the 1804 Spanish grant because the United States had acquired the land when it purchased Louisiana in 1803, and the Spanish governor had no authority to grant land in U.S. territory. *Id.* at 307-09.

That, however, was not the end of the matter. The Court next considered whether the plaintiffs could establish a valid title on the basis of article 8 of the Florida Treaty. *See id.* at 310-15. Article 8 stipulated that land grants made before 1818 by the Spanish government in the "Territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands." Florida Treaty, *supra*, art. 8. The Justices could not agree among themselves whether the disputed territory east of the Mississippi River and south of 31 degrees latitude was included within the terms of Article 8. *See Foster*, 27 U.S. at 313. Marshall, accordingly, devised a solution that enabled the Court to sidestep this disagreement. The Court held that even if Article 8 did apply to the land at issue, the treaty itself did not secure the property rights of individual recipients of Spanish land grants because the specific words of Article 8 – "shall be ratified and confirmed" – merely promised future legislative action by the U.S. government to ratify and confirm the prior Spanish land grants. *See id.* at 314. This holding later became the basis of the modern doctrine of non-self-executing treaties. Pursuant to this holding, the Court awarded judgment to the defendants. The rationale, though, was not that the treaty was not enforceable by private individuals. Rather, the rationale was that the plaintiffs did not have valid title to the land because the initial land grant from the Spanish governor was void, and the U.S. promise of future legislative action to ratify and confirm that grant was never executed.

In sum, between 1789 and 1829 there was not a single case in which this Court denied a remedy to an individual whose treaty-based primary rights had been violated. There were, however, 16 cases where an individual litigant obtained a remedy for a treaty violation, despite the fact that the treaty at issue did not create a private right of action and did not expressly empower individuals to invoke the treaty before a

domestic court. Thus, the assertion that treaties are not enforceable by private parties unless the treaty itself creates a private right of action -- which has been endorsed by several state courts and lower federal courts in recent cases involving the VCCR -- is squarely at odds with the Framers' original understanding of the judiciary's role in treaty enforcement.

II. MORE RECENT DECISIONS BY THIS COURT ALSO SUPPORT A STRONG PRESUMPTION IN FAVOR OF JUDICIAL REMEDIES FOR VIOLATIONS OF INDIVIDUAL TREATY RIGHTS

A. This Court Continues to Grant Individual Remedies in Cases Where the Treaty at Issue Does Not Create a Private Right of Action

The presumption in favor of judicial remedies for violations of individual treaty rights is not merely a relic of the past. This Court continued to apply that presumption throughout the nineteenth and twentieth centuries, and even into the twenty-first century. Four cases from three different centuries illustrate this point.

In *United States v. Rauscher*, 119 U.S. 407 (1886), the appellee challenged his criminal conviction on the ground that it violated Article X of the Webster-Ashburton Treaty, Aug. 9, 1842, art. X, U.S.-Great Britain, *reprinted in* 4 Treaties and Other International Acts of the United States of America, 363, 369-70 (Hunter Miller ed., 1934). The treaty did not expressly empower Rauscher to invoke Article X as a defense to criminal charges. Nevertheless, this Court ruled in favor of Rauscher on the basis of his treaty defense, holding that he had "a right to be exempt from prosecution upon the charge set forth in the indictment." *Rauscher*, 119 U.S. at

409. *Rauscher* is especially relevant to *Sanchez-Llamas*, because it demonstrates that a criminal defendant who has been harmed by a violation of his treaty rights has the power to invoke that treaty as a defense to criminal prosecution, even if the treaty is silent with respect to domestic judicial remedies.

In *Chew Heong v. United States*, 112 U.S. 536 (1884), a Chinese laborer who was detained on a ship near San Francisco filed a habeas corpus petition in federal court to obtain release from custody. *Id.* at 538. Chew Heong alleged that his detention violated Article II of an 1880 treaty between the United States and China, which stated: "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will." Treaty Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826. The treaty itself did not grant Chew Heong a right of access to U.S. court, nor did it expressly grant him the power to invoke the treaty before a U.S. court. Even so, the Supreme Court granted Chew Heong's habeas petition, holding that he was "entitled to enter and remain in the United States." *Chew Heong*, 112 U.S. at 560. In short, the treaty was judicially enforceable because the treaty created a primary individual right and the federal habeas statute provided a private right of action that enabled him to enforce that primary right. *Chew Heong* is especially relevant to *Bustillo*, because it demonstrates that a petitioner can bring a habeas corpus action to enforce his treaty rights, even if the treaty at issue does not create a private right of action.

The pattern of treaty enforcement described above, which combines treaty-based primary rights with domestic rights of action, continued into the twentieth century. In *Asakura v. Seattle*, 265 U.S. 332 (1924), the plaintiff was a Japanese national who operated a pawnbroker business in Seattle. *Id.* at 339. Seattle passed an ordinance that

prohibited non-U.S.-citizens from operating a pawnbroker business in the city. *Id.* at 339-40. Plaintiff sued to enjoin enforcement of the ordinance on the grounds that it violated a bilateral treaty with Japan. Treaty of Commerce and Navigation, Feb. 21, 1911, U.S.-Japan, 37 Stat. 1504. The treaty granted Japanese citizens a primary right "to carry on trade" in the United States "upon the same terms as native citizens or subjects." *Id.*, Art. I. However, the treaty did not expressly grant Japanese citizens a right to sue for injunctive relief. Nevertheless, the Supreme Court affirmed an injunction in favor of the plaintiff, relying on the traditional equitable action for injunctive relief as the basis of a domestic right of action to enforce the plaintiff's treaty-based primary rights.

Just three terms ago, in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), this Court upheld a judicial remedy for a private plaintiff who sued to enforce international agreements that did not themselves create a private right of action. In *Garamendi*, a trade association sued in federal court to enjoin enforcement of a California statute that required insurance companies to disclose information about "insurance policies issued to persons in Europe, which were in effect between 1920 and 1945." *Id.* at 409. The Court held that certain bilateral agreements between the United States and European governments preempted the California law.[4] *Id.* at 420-27. The bilateral agreements manifest the

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[4] The Court's preemption analysis relies primarily on three bilateral executive agreements: Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G, 39 I.L.M. 1298 [hereinafter, "U.S.-Germany Agreement"]; Agreement Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," October 24, 2000, U.S.-Aus., 40 I.L.M. 523; Agreement Concerning Payments for Certain Losses Suffered During World War II, January 18, 2001, U.S.-Fr., Temp. State Dep't No. 01-36.

drafters' expectations that the federal government might invoke the agreements in support of motions to dismiss private lawsuits. *See* U.S.-Germany Agreement, art. 2, para. 1 ("The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts . . . that dismissal of such cases would be in its foreign policy interest."). In *Garamendi*, though, the insurance companies invoked the bilateral agreements offensively in support of a suit against the state Insurance Commissioner to enjoin enforcement of a California statute. *See Garamendi*, 539 U.S. at 412. There is no language in any of the agreements indicating that the drafters intended to authorize this type of private lawsuit. Even so, the Court granted relief to plaintiffs on the grounds that the agreements preempted California law under the Supremacy Clause. *Id.* at 427-29. Thus, the Court in *Garamendi* tacitly relied on the Supremacy Clause as a basis for a private right of action to enforce international agreements that did not provide plaintiffs a right to sue in U.S. courts.[5]

In sum, the claim that treaties are not judicially enforceable by private parties unless the treaty itself creates a private right of action is refuted by two centuries of jurisprudence in which this Court has consistently approved remedies for individuals whose treaty rights were violated.

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[5] There are numerous cases decided in the past two decades in which the Supreme Court has tacitly relied on the Supremacy Clause as a basis for a private right of action to enjoin enforcement of state laws that are preempted by federal statutes. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 390-401 (2004) (analyzing cases). *Garamendi* differs from those cases in that the preemptive federal laws are international agreements, not federal statutes. Even so, the private right of action analysis is identical.

despite the fact that the treaty at issue did not create a private right of action. The approach that this Court has actually applied, which in practice amounts to a strong presumption in favor of judicial remedies for individuals whose treaty rights are violated, promotes U.S. compliance with its treaty obligations, and thereby helps avoid the international friction that would otherwise result from a breach of U.S. treaty obligations. In this way, the presumption in favor of judicial remedies helps realize the objective that the Framers sought to promote by including treaties in the Supremacy Clause – that is, to avoid situations where treaty violations lead to unwanted international conflicts. *See* Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1110 (1992) ("The Convention and ratification debates, and contemporaneous statements, show clearly that the Framers were concerned about treaty violations because they could provoke wars, deter other nations from entering into beneficial agreements with us, and adversely affect the nation's reputation.")

B. Cases Cited by the Oregon Supreme Court Are Consistent with the Presumption in Favor of Judicial Remedies

The Oregon Supreme Court relied on three U.S. Supreme Court decisions in support of its assertion that there is "a presumption against the creation of individual judicially enforceable rights" by means of treaties. *See State v. Sanchez-Llamas*, 108 P.3d 573, 575-77 (Or. 2005). The three cases are: *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580 (1884); and *Foster v. Neilson*, 27 U.S. 253 (1829). For the reasons noted above, *Foster* is consistent with a presumption in favor of judicial remedies for violations of individual treaty rights. *See supra* Part I.E.

In *Amerada Hess*, the plaintiff was not even raising a claim under a treaty. The plaintiff, a shipping company, alleged that Argentina had violated its right to engage in neutral shipping operations, which is protected under customary international law. *Amerada Hess*, 488 U.S. at 432. The Court rejected the claim on sovereign immunity grounds. *See id.* at 439-41. The plaintiff in *Amerada Hess* did invoke two treaties in support of its argument that the defendant, Argentina, had waived the sovereign immunity to which it might otherwise be entitled under the Foreign Sovereign Immunities Act. *See Amerada Hess*, 488 U.S. at 441-43. The Court, however, held that the subject treaties did not contain a waiver of sovereign immunity. *Id.* The Court mentioned in passing that the treaties "do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* at 442. Given that the plaintiff did not base its right of action on a treaty, this statement is best read as an affirmation that the treaties cited did not waive the defendant's sovereign immunity because they did not specify that private parties could bring suit in U.S. courts to recover damages from foreign states.

Amerada Hess at most suggests that a defendant can overcome the presumption in favor of judicial remedies for violations of individual treaty rights by successfully raising a sovereign immunity defense. Neither respondent in the present case, though, is entitled to sovereign immunity. The State of Oregon cannot claim immunity because it is in the position of prosecutor in the *Sanchez-Llamas* case. And the State of Virginia cannot claim immunity because sovereign immunity is not a valid defense to a habeas corpus petition. *See* Larry W. Yackle, Federal Courts 313 (1999). Thus, *Amerada Hess* provides no support for respondents in this case.

Head Money Cases, 112 U.S. 580 (1884), also cited by the Oregon Supreme Court, actually supports a presumption *in favor of* judicial remedies for violations of individual treaty rights. In *Head Money Cases*, this Court drew a critical distinction between treaties that are "primarily a compact between independent nations," and treaties that "contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other." *Id.* at 598. In short, there is an important distinction between treaties that create primary rights for individuals and treaties that do not create such rights. If a treaty does not create primary rights for individuals, "its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.* at 598. If, however, a treaty prescribes "a rule by which the rights of the private citizen or subject may be determined . . . [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.*, at 598-99. In light of the cases discussed above, it is evident that the Court's reference to rules "by which the rights of the private citizen . . . . may be determined" is a reference to primary rights, not private rights of action. Thus, *Head Money Cases* stands for the proposition that courts should enforce treaties on behalf of private individuals whenever the treaty prescribes a primary rule governing the rights of private individuals – that is, whenever the treaty protects primary individual rights.

III. INDIVIDUALS WHO ARE HARMED BY VIOLATIONS OF PRIMARY RIGHTS PROTECTED BY THE VCCR ARE ENTITLED TO JUDICIAL REMEDIES

For the reasons explained above, if a particular treaty provision is the Law of the Land under the Supremacy Clause, and it protects primary individual rights, then individuals who are harmed by a violation of their treaty-based primary rights are entitled to domestic judicial remedies, unless Congress has enacted legislation to preclude such remedies. There is no dispute that the VCCR is the Law of the Land. Although congressional amendments to the federal habeas statute may bar federal habeas review of some Vienna Convention claims, Congress has not enacted legislation to preclude state court remedies for violations of the VCCR. Therefore, individuals harmed by violations of their rights under Article 36 are entitled to judicial remedies in state courts.

A. Article 36 of the VCCR Protects Primary Individual Rights

For the purpose of this brief, an individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. The question whether a state party has such a duty is a question of treaty interpretation. Courts look to the plain meaning of the text to determine the correct interpretation of a treaty. *See Geofroy v. Riggs*, 133 U.S. 258, 271 (1890). It is clear from the plain meaning of the treaty text that Article 36(1) of the VCCR grants primary rights to individuals. A foreign national arrested in the United States has a primary right "to communicate with and [have] access to consular officers of the sending State."

VCCR, art. 36, para. 1(a). The arrested foreign national also has a primary right to request that U.S. authorities "inform the consular post of the sending State" that he has been arrested, and U.S. authorities have a legal duty to honor such requests. VCCR, art. 36, para. 1(b). Moreover, the foreign national has a primary right to be informed "without delay" of his right of access to consular officers. *Id.* It is difficult to imagine how anyone could conclude, on the basis of this text, that Article 36 does not grant primary rights to individuals. The text of Article 36 is sufficiently clear that it is not necessary to resort to any supplementary means of treaty interpretation.

There is no doubt that petitioners' individual rights under Article 36 were violated. In *Sanchez-Llamas*, the Oregon Supreme Court admitted that "[t]he police did not inform defendant at that time, or at any time thereafter, that he had any right under Article 36 of the VCCR to communicate with the Mexican consulate." *Sanchez-Llamas*, 108 P.3d at 574. Since Sanchez-Llamas is a defendant in a criminal proceeding, he does not need to establish a right of access to court. Moreover, in accordance with the controlling Supreme Court precedent discussed above, he has the power to invoke the VCCR in a domestic court if he was harmed by the violation of his treaty rights. Therefore, the only significant question in his case is whether he was harmed, and if so, what is the appropriate remedy.

In *Bustillo*, the United States has conceded that petitioner's Vienna Convention rights were violated. *See Bustillo*, Petition for a Writ of Certiorari, at 3. Virginia's habeas corpus statute granted Mr. Bustillo a right of access to state court to pursue his habeas petition. *See* Va. Code § 8.01-654. Moreover, in accordance with controlling Supreme Court precedent, he had the power to invoke the VCCR in a Virginia court if he was harmed by the violation

of his treaty rights. Nevertheless, the State of Virginia claims that state procedural default rules prevent Mr. Bustillo from raising a VCCR claim in his state habeas petition. The next section of this brief addresses that argument.

B. The State of Virginia May Not Invoke Procedural Default Rules if Doing So Would Contravene U.S. Treaty Obligations

In *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ 128 [hereinafter, *Avena*], the International Court of Justice held that the United States has an international obligation under Article 36(2) of the VCCR to provide review and reconsideration, *by means of a judicial proceeding*, of the convictions and sentences of individuals whose rights under Article 36(1) of the VCCR have been violated. *See id.* at ¶¶ 138-43. This brief assumes that the ICJ's decision in *Avena* constitutes a correct interpretation of Article 36(2). Given this interpretation, the question arises as to which actor or actors in the domestic legal system have the authority to choose to violate U.S. obligations under Article 36(2). In other words, under the U.S. constitutional system, who has the constitutional authority to decide not to provide the judicial review required by Article 36(2)?

There is no doubt that Congress has the constitutional authority to enact legislation to preclude the type of judicial review required by Article 36(2). Such legislation would be a violation of the United States' international obligations, but it would supersede the treaty for purposes of domestic law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a). State courts, however, unlike Congress, do not have the constitutional authority to decide to violate U.S. treaty obligations. Moreover, if a state court with jurisdiction over a relevant case denies "review and reconsideration" to an individual who has been convicted and

sentenced to severe penalties after having been deprived of his rights under Article 36(1), the court itself commits a violation of Article 36(2). *See Avena*, ¶¶ 138-41. Since courts lack the constitutional authority to choose to violate U.S. treaty obligations, every judicial decision refusing to provide review and reconsideration is a judicial act in excess of that court's constitutional authority, unless that treaty violation has been authorized by Congress.

The present case is readily distinguishable from cases where state procedural default rules bar a state habeas remedy for an individual whose federal constitutional rights were violated. The U.S. Constitution does not contain any provision that prohibits state governments from applying procedural default rules to bar remedies for individuals whose federal constitutional rights were violated. (If the Constitution did contain such a provision, then states could not apply procedural default rules to bar federal constitutional claims.) Article 36(2) of the VCCR, however, does prohibit state governments from applying procedural default rules to bar remedies for individuals whose primary rights under Article 36(1) were violated, at least in cases where those individuals were "convicted and sentenced to severe penalties."[6] Since the VCCR is Law of the Land under the Supremacy Clause, it preempts state procedural rules insofar as application of those rules would contravene U.S. treaty obligations.

The present case is also readily distinguishable from *Breard v. Greene*, 523 U.S. 371 (1998). In *Breard*, this

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[6] In *Breard v. Greene*, 523 U.S. 371 (1998), this Court expressed the view that the VCCR did not preclude application of domestic law procedural default rules. This interpretation of the VCCR, rendered without the benefit of briefing on the merits, has since been rejected by the ICJ. *See Avena*, ¶¶ 138-41.

Court, in denying discretionary relief, expressed the view that petitioner's federal habeas petition alleging violations of the VCCR was barred, *inter alia*, by the Antiterrorism and Effective Death Penalty Act, a federal statute enacted long after the U.S. ratified the VCCR.[7] *See id.* at 376. Under the last-in-time rule, a later-in-time federal statute takes precedence over an earlier-in-time treaty, insofar as there is an unavoidable conflict between the two laws. *See* Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a). Therefore, if a treaty requires "review and reconsideration," but a later-in-time federal statute precludes federal habeas review, the statute takes precedence over the treaty as a matter of domestic law, insofar as petitioner is seeking federal habeas review. The present case, however, involves the application of a state procedural default rule. If there is an unavoidable conflict between a treaty and a state statute or rule, the treaty always takes precedence over state law because the Supremacy Clause says so. U.S. Const. art. VI, cl. 2. Thus, in contrast to Congress, state legislatures do not have the constitutional power to authorize application of procedural default rules in cases where application of such rules would contravene U.S. treaty obligations.

This construction of the Supremacy Clause promotes the central purpose underlying the Framers' decision to include treaties in the Supremacy Clause. Under the Articles

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[7] This Court also said in *Breard* that Paraguay's claim against the Governor of Virginia was barred by the Eleventh Amendment, *id.* at 377-78, and that Paraguay did not have a private right of action to bring its claim in U.S. courts. *Id.* at 377-78. It is noteworthy, though, that the Court did not say that the Eleventh Amendment barred Breard's individual claim, or that Breard himself lacked a private right of action. This reinforces the point that neither of these objections bars Mr. Bustillo's claim.

of Confederation, states were routinely violating U.S. treaty obligations, and the federal government was powerless to halt those violations. *See* Vazquez, *Treaty-Based Rights*, 92 COLUM. L. REV. at 1101-04. The Framers' solution to this problem, embodied in the Supremacy Clause, was to give treaties the status of federal law, and to make treaties directly binding on judges in state courts. *See id.* at 1104-10. *See also* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2120-26 (1999). In recent years, state governments have routinely violated U.S. obligations under Article 36(1) of the VCCR, just as state governments violated U.S. treaty obligations before adoption of the Constitution. This court can solve that problem, and halt ongoing violations of Article 36(1), by ruling that state courts may not apply procedural default rules in cases where application of such rules would deprive individual foreigners of the judicial review and reconsideration required by Article 36(2). If this Court fails to issue such a ruling, state officers will continue to violate Article 36(1) of the VCCR, thereby perpetuating the problem that the Supremacy Clause was intended to rectify.

Finally, it bears emphasis that the United States can fulfill its treaty obligations under the VCCR by ensuring the availability of habeas relief in state courts, because the VCCR does not require a federal habeas remedy for treaty violations if a state remedy is available. Therefore, this Court can avoid any conflict between the VCCR and federal habeas law by ruling that state procedural default rules must yield to the treaty in cases where application of such state rules would contravene Article 36(2).

CONCLUSION

For the reasons noted above, this Court should hold that every individual who has been harmed by a violation of his primary rights under Article 36(1) of the VCCR is entitled to a judicial remedy for that violation, except insofar as congressional amendments to the federal habeas statute enacted after ratification of the VCCR limit the availability of federal habeas relief. Additionally, Article 36(2) of the VCCR requires state courts in Virginia to provide review and reconsideration of Mr. Bustillo's case, and state courts may not apply procedural default rules to bar the judicial review required by the treaty.

Respectfully submitted.

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IN THE
Supreme Court of the United States

MARIO BUSTILLO,

Petitioner,

v.

GENE JOHNSON,
Director, Virginia Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF *AMICI CURIAE* OF THE MID-ATLANTIC INNOCENCE PROJECT AND THE NATIONAL LATINO PEACE OFFICERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTERESTS OF AMICI CURIAE[1]

This brief is respectfully submitted in support of Petitioner by the Mid-Atlantic Innocence Project and the National Latino Peace Officers Association.

The Mid-Atlantic Innocence Project is a non-profit legal, educational, and advocacy organization dedicated to the exoneration and release of persons who have been convicted in Maryland, Virginia, or the District of Columbia of crimes that they did not commit. In furtherance of its mission, the organization provides pro bono investigative and legal assistance through a network of attorneys and law students to those prisoners whose innocence can be proved by DNA testing or other evidence. Additionally, the Mid-Atlantic Innocence Project advocates the adoption of rules and procedures that most effectively enhance our criminal justice system's truth-finding function.

Earlier this year the Mid-Atlantic Innocence Project coauthored a report entitled *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia*. This report closely analyzed eleven known wrongful convictions of rape and/or murder in Virginia between 1982 and 1990 and identified a number of factors that significantly contribute to the risk of wrongful convictions. Among the factors identified were defense counsel's failure to obtain exculpatory evidence and the

1. No counsel for either party authored this brief in whole or in part; and no person or entity, other than the Mid-Atlantic Innocence Project, the National Latino Peace Officers Association, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have each consented in writing to the filing of this brief.

phenomenon of false confessions, factors that, as discussed below, can be implicated by the denial of consular notification.

The National Latino Peace Officers Association, a non-profit organization, is the largest Latino law enforcement organization in the United States, with over 75 chapters across the United States, including Puerto Rico. Its membership includes federal, state, and local peace officers from around the country. The Association's mission includes the elimination of prejudice and discrimination in the criminal justice system as well as the training of peace officers to qualify them for promotion, and among its core values is the promotion of professionalism in law enforcement.

Both the Mid-Atlantic Innocence Project and the National Latino Peace Officers Association believe that the pursuit and discovery of truth not only help ensure that innocent persons will not suffer wrongful conviction, but also that such pursuit and discovery benefit the public welfare by locating those persons who are actually responsible for crime. Both organizations believe that this case presents a compelling example of how recognition of an individual right to consular notification on the part of foreign nationals detained within the United States would improve and enhance the truth-finding abilities of the criminal courts.

SUMMARY OF ARGUMENT

Both the federal and the state criminal justice systems hinge on the discovery of truth. Courts cannot accurately ascertain the innocence or guilt of individuals unless there is a reliable and comprehensive fact-finding process. When crucial evidence goes undiscovered, unintroduced, and unconsidered during a criminal trial, the determination of innocence or guilt is hobbled. This works an injustice not only on the individual on trial, but also on society as a whole, which has an overwhelming interest in both the freedom of the innocent and the punishment of the guilty.

Petitioner Mario Bustillo sits in prison for a crime he almost surely did not commit because the truth-finding process in his case was woefully incomplete. Competent evidence developed after Bustillo's conviction strongly suggests that the course of his trial would have been dramatically altered had the Commonwealth of Virginia simply informed Bustillo of his right under the Vienna Convention on Consular Relations to contact his home country's consulate. Had Bustillo been notified of this right, compelling evidence that another man committed the crime for which Bustillo was convicted would have been discovered and could have been used by law enforcement officials investigating the crime, as well as by prosecution and defense attorneys. This case clearly illustrates the prejudice that can accrue to foreign nationals who are not informed of their right to contact their home country's consulate.

More broadly, consular officers can serve as an essential safeguard against the conviction of innocent persons both by providing a "cultural bridge" to foreign nationals who face criminal charges and by providing substantial assistance

in the fact-finding process. In particular, they can help law enforcement officials, prosecutors, and defense attorneys avoid misunderstandings common in intercultural communications, help reduce the number of foreign nationals who falsely confess to crimes they did not commit, and procure evidence from the suspect's country of origin or from the relevant community of foreign nationals living in the United States.

Many countries, including the United States, recognize the unique disadvantages faced by individuals suspected of crimes in a foreign country, and, when properly notified, provide assistance to their own nationals faced with criminal charges abroad. The benefits of consular involvement were clearly envisioned by the countries that entered into the Vienna Convention.

For all of these reasons, this Court should recognize foreign nationals' individual right to be notified that they can contact their consul when detained in the United States.

ARGUMENT

I. FACTS SUPPORTING BUSTILLO'S STRONG CLAIM OF ACTUAL INNOCENCE WOULD HAVE COME TO LIGHT HAD HE BEEN NOTIFIED OF HIS RIGHT TO CONTACT THE HONDURAN CONSULATE.

There is overwhelming evidence that another man committed the crime for which Mario Bustillo is currently incarcerated. Furthermore, it is highly likely that this evidence would have been uncovered had the Commonwealth of Virginia fulfilled its obligation under Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention], to inform Bustillo of his right to contact his country's consulate.

Petitioner Bustillo, a Honduran national, was arrested in the Commonwealth of Virginia on suspicion of the murder of James Merry. Merry was struck in the head with a baseball bat outside a restaurant in Springfield, Virginia on December 10, 1997, and he died several days later. Bustillo argued at trial that Merry was killed by another Honduran national — a man known to Bustillo only as "Sirena." Bustillo's claim of innocence was supported by the testimony of two eyewitnesses who stated that Bustillo did not deliver the blow that killed Merry. One of these eyewitnesses specifically identified Sirena as the man who struck and killed Merry. 3/18/98 Tr. at 141-142; 100-101. A third witness testified that she saw Sirena on a specified flight to Honduras the day after Merry died. *Id.* at 167-168. Bustillo and his counsel at the time of trial could not locate Sirena and did not know Sirena's real name.

Separately, the police possessed reports revealing that one "Julio C. Osorto" — the man whom Bustillo knew only as Sirena — was stopped near the murder scene and questioned by Officer Christopher Mahoney just hours after the crime. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 1, J.A. 134. In addition, the investigation notes of another police official, Detective Richard Cline, specifically refer to "Julio-Sirena." Notes of Det. Richard Cline, Dec. 18, 1997, at 1. Although the police and prosecution were unaware of the connection between "Sirena-Julio" and Julio Osorto, 03/18/98 Tr. at 70, the Circuit Court of Fairfax County later held that "[t]he Commonwealth should have known, given the contents of the investigative notes and the police report, that 'Sirena-Julio' and Julio Osorto might be one and the same person[,] . . . especially given the defense's insistence that 'Sirena'/'Julio' was the assailant." J.A. 146.

Put differently, if they had had more information concerning the true identity of Sirena, the police could have conducted a much more thorough investigation, and they could have made sense of those pieces of the puzzle that they already had but that they thought were irrelevant. For example, had they made the connection between Sirena and Osorto, the police surely would have been more interested in the red stains that Officer Mahoney observed on Osorto's clothing and would have ascribed greater significance to the inconsistencies in Osorto's conflicting stories concerning his whereabouts that night.

The defense, too, could have helped solve the murder by connecting the dots. Had Bustillo's attorney known Sirena's real name, he could have requested, under *Brady v. Maryland*, 373 U.S. 83 (1963), any police reports or notes concerning Osorto, and on receiving the report and notes described above, he could have explained to the police, in the unlikely event that they were not already hot on the trail, that they should investigate the possibility that Osorto was the murderer. In this fashion, the pursuit of the truth would have been dramatically enhanced.

At trial the prosecution questioned the existence of "this so called Sirena" and called Sirena's absence "very convenient," J.A. 21-22. Moreover, crucial exculpatory evidence — unavailable to the defense at the time — was not introduced. Left to deliberate based on an incomplete factual record, the jury found Bustillo guilty, and he was sentenced to thirty years in prison. 3/20/98 Tr. at 24.

At no time was Bustillo informed that, as a foreign national, he had a right to contact the consulate of his home country, Honduras. This failure crippled the investigations of law enforcement, the prosecution, and the defense, and irrevocably damaged the trial's truth-finding process.

Bustillo has sworn that he would have contacted the Honduran consulate if he had been notified of his rights. J.A. 60. The Honduran government has indicated that, had Bustillo contacted the Honduran consulate, it would have provided him with biographical data concerning Osorto/ Sirena, a photograph of him, and official documents confirming that he entered Honduras just following the murder on the very flight attested to by the defense witness. J.A. 73-74. Honduras has further indicated that it would have attempted to locate and interview Osorto. J.A. 32. Considering that Bustillo's habeas attorney was able to secure a surreptitiously videotaped recording of Osorto, in Honduras, confessing in graphic detail to the murder of Merry, it is very likely that the government of Honduras would have been able to uncover facts related to Osorto's involvement in the murder. J.A. 39-40.

At a minimum, the involvement of the Honduran consulate would thus have enlightened *both the prosecution and the defense* concerning the following: (1) that the real name of the man called "Sirena" was Julio Osorto; (2) that a photograph of Osorto was available to show witnesses for identification; and (3) that, consistent with the testimony of a defense trial witness, Osorto had returned to Honduras almost immediately after Merry's death.

For the prosecution, this evidence undoubtedly would have caused the police at least to investigate whether another person was responsible for the crime. As noted above, the aid of Honduras would have illuminated the significance of the facts the police already knew concerning Osorto: that he was stopped at the crime scene, that his clothes were stained red, and that he offered inconsistent alibis. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 2, J.A. 135. These facts, combined with an eyewitness identification of Sirena as the murderer and confirmation that Sirena/Osorto had fled to Honduras right after the crime, would have allowed the Commonwealth to conduct a far more informed and effective investigation of James Merry's murder, one that would have identified and pursued Osorto as a murder suspect.

Had the Commonwealth nonetheless proceeded to trial against Bustillo, notification of the Honduran consulate also would have dramatically improved the effectiveness of Bustillo's defense and the quality of the trial as a vehicle for establishing the truth. First, the prosecution would not have been able to cast real doubt on the existence of "this so called Sirena," effectively undermining the credibility of Bustillo's entire defense. J.A. 22. Second, Bustillo could have introduced the police reports placing Osorto near the murder scene with red stains on his clothing. Third, the testimony of Amilcar Amaya identifying Sirena as the murderer would have had far more weight if the jury had known both that Sirena is a real person and also that he was at the scene of the crime. Finally, Bustillo would have been able to introduce hard evidence that Sirena had fled to Honduras, confirming the testimony of Ulma Martinez that she saw him on her flight the day after Merry died. 3/18/98 Tr. at 167-168.

To be sure, there is evidence placing Bustillo at the scene of the crime. But this evidence, which even standing alone had grave weaknesses and which pales when placed beside the overwhelming evidence of Osorto's guilt, in no way undermines the harm that the Commonwealth's violation of the Vienna Convention caused to both the investigation and the trial of this case. The fact remains that crucial and powerful evidence that Osorto, not Bustillo, murdered Merry went undiscovered, unintroduced, and unconsidered during Bustillo's trial — all directly traceable to the failure to notify the Honduran consulate.

This case provides new and unfortunate confirmation of a proposition established by detailed studies of other wrongful convictions: the failure of defense counsel to discover exculpatory evidence is often a significant factor leading to such wrongful convictions. A study released earlier this year by the Innocence Commission for Virginia and coauthored by the Mid-Atlantic Innocence Project found that in three of the eleven wrongful convictions studied, important exculpatory evidence was not disclosed to defense counsel. INNOCENCE COMMISSION FOR VIRGINIA, A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA (2005), at 62, *available at* http://www.icva.us [hereinafter ICVA REPORT].[2] Defense counsel's failure to discover crucial

2. The ICVA Report corroborates the conclusion drawn by earlier scholars and researchers. *See, e.g.*, Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 tbl.6 (1987) (discussing suppression of exculpatory evidence as a cause of wrongful convictions); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 62 (2002) (noting the "markedly high incidence"

(Cont'd)

exculpatory evidence can stem from a variety of causes. As the case now before the Court illustrates, one such cause can be that a foreign-national suspect is not made aware of his right to contact his consulate, and as a result, evidence that would have helped in the search for the truth is never located.

As the United States has conceded, Bustillo should have been notified of his right to contact the Honduran consulate.[3] Unfortunately, he was not. As a result of this violation, most likely an innocent man sits in prison, while James Merry's murderer walks free in Honduras. This case is an unsettling example of how the truth-finding function of the state courts can be severely impaired by the violation of a criminal defendant's right to consular notification.

The wrong in this case is not singular to Bustillo, although the damage to him is undeniable. The wrong in this case also is inflicted on the public as a whole: the entire process of the criminal justice system, from the police investigation to the performance of defense counsel to the

(Cont'd)

of suppression of exculpatory evidence in wrongful conviction cases examined); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 312-313 (2001) (citing recent study showing that "convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence suggesting the defendants' innocence or presented evidence they knew to be false"); James S. Liebman & Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii & app. C & D (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman (noting suppression of exculpatory evidence as a leading cause of wrongful convictions in capital cases and citing examples).

3. The United States has issued an apology to Honduras.

deliberation and determination of the jury at trial, was hobbled by the Commonwealth's failure simply to notify Bustillo of his right to contact the Honduran consulate as required under the Vienna Convention. This case is a perfect example of why the personal right to consular notification is essential to our criminal justice system's most vital purpose, the accurate determination of guilt and innocence.

II. CONSULAR NOTIFICATION AMELIORATES THE UNIQUE DISADVANTAGES FACED BY FOREIGN NATIONALS THAT CAN OTHERWISE INHIBIT THE SEARCH FOR TRUTH IN CRIMINAL INVESTIGATIONS AND PROSECUTIONS.

As this Court observed in *Herrera v. Collins*, "the central purpose of any system of criminal justice is to convict the guilty and free the innocent." 506 U.S. 390, 398 (1993). The fulfillment of this purpose requires the determination of the truth, which can be ascertained only through the discovery and consideration of relevant facts. In order both to ensure the freedom of innocent suspects and to uncover and punish those who commit crimes, the legal system must provide a reliable and comprehensive fact-finding process. Recognizing the existence of an individual right to consular notification under the Vienna Convention will further this process and thus serve the all-important purpose of the criminal justice system.

The Vienna Convention identifies protecting the interests of nationals abroad and assisting such nationals as two primary consular functions. Vienna Convention, arts. 5(a) & (e), 21 U.S.T. 77. The provisions of Article 36 — the Article that establishes the right of consular officers to visit, communicate with, and assist their detained national — are

intended to further these functions. *See id.* art. 36. Consular officers, however, cannot perform their functions if they are not aware of a national's detention. Thus, the parties to the Vienna Convention agreed that a detained foreign national must be granted the right to contact his consul. *Id.* art. 36(b). Moreover, because individuals are unlikely to be aware of this right, the parties agreed that a detained foreign national must be informed of his right to contact his consul. *Id.* In this fashion, Article 36(b) enables consular officers to fulfill the important functions that the international community agrees they should play.

In addition to the language of the Vienna Convention, the negotiating history of Article 36 of the Convention suggests that most parties to the treaty, including the United States, were concerned about preserving a foreign national's individual right to consular notification. A particularly illuminating incident occurred when the Government of Venezuela proposed an amendment to the Convention that would have eliminated the individual right of consular communication. Other nations strongly opposed this amendment, and it was withdrawn. *See Standt v. City of New York*, 153 F. Supp. 2d 417, 425-26 (S.D.N.Y. 2001). Moreover, the United States itself "proposed language to 'protect the rights of the national concerned.'" *Id.* at 426 (*quoting* 2 United Nations Conference on Consular Relations: Official Records, at 337, U.N. Doc. A/Conf. 2 5/6 (1963)).

The strong inference to be drawn from both the text and the negotiating history of these passages is that the parties to the Convention recognized the difficulties faced by nationals abroad, especially when they find themselves enmeshed in a criminal investigation or prosecution. The parties viewed it as a core consular function to help nationals abroad to

overcome these difficulties. Indeed, the United States Department of State recognizes that "[f]ew of our citizens need . . . assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 412 (2004), *available at* http://foia.state.gov/regs/search.asp.

Simply by virtue of their non-native status, foreign nationals often face unique disadvantages in criminal proceedings, including language barriers and increased vulnerability to intimidation and manipulation. Without the support network usually available to citizens, they may also find they have little ability to direct or assist in a factual investigation.

Consular officers serve as a "cultural bridge" for their nationals who are detained abroad, and as such they can help overcome the special obstacles faced by those foreign nationals. *See* William J. Aceves, *International Decision*, 92 AM. J. INT'L L. 87, 89 (1998) ("Consular access . . . provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system."). There are at least two ways in which consular notification can aid both the foreign national and the fact-finding process that will determine his innocence or guilt: (1) consular officers can mediate the often significant language and cultural gaps between a foreign national and law enforcement personnel; and (2) consular officers can aid in the fact-finding process by providing access to information and individuals that may be available only in the foreign national's country of origin or in the relevant community of foreign nationals living in the United States.

A. Communication Gaps: Cross-Cultural Communication Problems and False Confessions.

Although it is not clear from the record in this case that they played a role in Bustillo's conviction, difficulties inherent in cross-cultural communications often present a significant challenge to foreign nationals who are suspected of or indicted for criminal acts. Even if a foreign national has a strong command of English or has the assistance of a fluent translator, ingrained cultural norms can lead to misunderstandings between the foreign national and his counsel or the authorities. *See, e.g.*, Janet Bauer, *Speaking of Culture: Immigrants in the American Legal System*, *in* IMMIGRANTS IN COURTS 8, 16 (Joanne I. Moore ed., 1999) [hereinafter *Speaking of Culture*] ("The 'language' of culture includes an array of not only verbal but also nonverbal signals. These include contexts, relations, emotions, and gestures that convey norms, values, schemas, meanings, intentions, and credibility."); Diana Eades, *"I Don't Think the Lawyers Were Communicating with Me": Misunderstanding Cultural Differences in Communicative Style*, 52 EMORY L.J 1109, 1126 (2003) [hereinafter *Misunderstanding Cultural Differences*] ("Even when grammar and accent seem quite close, ways of communicating or pragmatics may contain considerable differences that significantly affect communication."); Joan B. Kessler, *Perspective: The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64, 74 (1988) (noting that an American lawyer "may arrive at inaccurate assumptions about the meaning of a [foreign national] client's responses," and that "[t]he lawyer must be aware of the possibility of misinterpretation, and pursue the issues for clarification").

For example, avoidance of eye contact, silences, and pauses — which Americans typically interpret as signs of evasiveness and dishonesty — can convey quite different meanings depending on the speaker's cultural background. *See Speaking of Culture* at 10 (noting that in Laotian culture eye contact is a sign of anger); Juan-Vicente Palerm et al., *Mexican Immigrants in Courts*, *in* IMMIGRANTS IN COURTS 73, 92 ("[R]ural Mexicans believe it is rude . . . to look directly at a person of authority; thus they may avoid eye contact in a respectful gesture. . . ."); *Misunderstanding Cultural Differences*, at 1127-30 (discussing the use of silence and pauses in communicative patterns of various cultures). Consular officers, as a "cultural bridge," can help law enforcement officials, prosecutors, and defense attorneys avoid the misunderstandings common in intercultural communications.

Consular officers can also help to allay any concerns that a suspect or witnesses might have about speaking with an attorney. They can, for example, explain to the defendant that, even though his attorney may be provided by the state, the attorney's duty of loyalty is to the client. Consular officers can also explain to witnesses the role of defense counsel in the United States and discuss with these witnesses the importance of cooperating with the attorney. Alternatively, consular officers can themselves speak with potential witnesses and pass along any relevant information to defense counsel.

Consular intervention may also help to avoid another significant risk — namely, the risk of false confession. Although there was no false confession in this case, false confessions are a significant factor in many wrongful convictions. *See, e.g.*, ICVA REPORT, at 42-54. According to the ICVA Report, "today's interrogation methods are so

effective, so powerful, and so calculated to obtain incriminating admissions, that they sometimes influence innocent people to falsely admit to crimes in which they had no involvement." *Id.* at 42.

The dangerous consequences of false confessions are not limited to their use at trial, nor is their effect limited to the individual suspect. "[F]alse confessions have sidetracked the police from pursuing the real perpetrators, led police and prosecutors to resist reversing course once they have mistakenly concluded that the confessor is guilty, and caused courts to confirm convictions long after compelling evidence surfaces that the system has prosecuted the wrong person." *Id.* at 43.

Foreign-national suspects may be particularly susceptible to giving false confessions. This is due in part to the fact that cultural barriers may prevent foreign nationals from "understand[ing] the '[arresting] nation's customs, police policies, or criminal proceedings.'" Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 605 (1997) (*quoting* Brief for United Mexican States as Amicus Curiae Supporting Appellant at 9, *Ohio v. Loza*, 1997 WL 634348 (Ohio Ct. App.1997) (No. CA96-10-214)). A consular official can help reassure a foreign-national suspect within the United States that he need not, and should not, confess to a crime if he did not commit it.

B. Aid in the Fact-Finding Process.

As Bustillo's case powerfully illustrates, contact with a foreign national's home consulate can be a critical aid in the fact-finding process. Consular officers are able to procure evidence from the suspect's country of origin and are often better able to gain entree into the relevant community of foreign nationals who are living in the United States. *See, e.g.*, Brief of European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (stating that consular officers "may assist in locating witnesses or documentary evidence available in the Sending State[, which] may be critical in a determination of guilt . . ."); Brief of Foreign Sovereigns as Amici Curiae Supporting Petitioner, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (stating that consular officers can "help collect evidence for use at trial"). This evidence may include testimony or documentary evidence that sheds light on either the particular circumstances of the crime or the background of the criminal suspect.

Such evidence will not necessarily be exculpatory. Involvement of consular officers may lead to evidence that implicates the criminal suspect — perhaps, for example, by providing a motive for the criminal act or revealing that the suspect has a history of related crimes. Contact with consular officers is vital not because it will further the release of every foreign-national suspect but because it will facilitate and aid the truth-finding process so that judges and juries can make an accurate determination of innocence or guilt. In short, the intervention of consular officers, made possible by notification of the detained foreign national of his right to contact his consul, will improve the fact-finding process of the criminal justice system in the state courts, thus enhancing the likelihood that the truth will be discovered and justice will be done.

CONCLUSION

For these reasons, amici curiae the Mid-Atlantic Innocence Project and the National Latino Peace Officers Association respectfully urge this Court to reverse the decision of the Supreme Court of Virginia.

Respectfully submitted,

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IN THE

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MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

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INTEREST OF THE *AMICI CURIAE* [*]

Amici are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. This case raises important questions concerning the interpretation of treaties to which the United States is a party and the authority of an international tribunal to effect direct changes in a core area of U.S. domestic law, namely whether individuals can assert treaty violations in the course of a criminal prosecution and secure suppression of evidence and dismissal of such proceedings. Acceptance of the arguments put forward by petitioners would undermine the authority of the Executive Branch in interpreting the international obligations of the United States, disregard the authority of Congress to determine the conditions under which federal courts can enforce international law, and bring about an unprecedented and profound change in the relationship between international organizations and domestic lawmaking in the United States.

SUMMARY OF ARGUMENT

The Vienna Convention on Consular Relations does not require the United States to permit individuals to challenge treaty violations in domestic court, and there is no evidence that the President or the Senate intended such an outcome when they adhered to this treaty. The President's interpretation of the Vienna Convention warrants substantial deference from this Court. The President is in the best position to determine the impact of any particular inter-

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[*] In accordance with Supreme Court Rule 37.6, *Amici* affirm that no person or entity other than *Amici* and their counsel authored this brief in whole or in part, and that no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

pretation on the foreign relations of the United States. In this case the President's interpretation is consistent with the text of the Convention, which does not specify the means of domestic enforcement, and the practice of other signatory states, not one of which has treated the Vienna Convention as authorizing private enforcement in domestic courts. A contrary interpretation would cast a pall on future treaty negotiations by the United States because it would increase the risk of unanticipated and potentially undesirable private interference with treaty enforcement.

Neither comity nor a policy of uniform treaty interpretation compels this Court to regard the Vienna Convention as creating a private right of enforcement. The International Court of Justice, the only tribunal that has reached such a conclusion, is not a national court but an international agency with clearly delimited authority. It lacks the characteristics of a domestic agency that invite judicial deference. Regarding it as an expert body deserving of special deference will deter the United States from joining future treaties that assign even limited responsibility to international agencies. Finally, a decision that the Vienna Convention authorizes private enforcement will disrupt rather than promote uniform treaty interpretation, as no other state has reached such a conclusion.

ARGUMENT

I. THE VIENNA CONVENTION DOES NOT CONFER ON INDIVIDUALS A JUDICIALLY ENFORCEABLE RIGHT TO CONSULAR NOTIFICATION AND ACCESS

This Court has long held that the decision of the United States to adhere to a treaty, made in conformity with Article II, § 2, cl. 2, does not automatically endow individuals with the right to seek judicial redress for treaty violations. Because treaties typically establish obligations between states, they do

not normally empower domestic courts to embark on their own enforcement regime. Courts are reluctant to infer that this power exists absent clear evidence that the Executive and the Senate intended such a result. In the case of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Vienna Convention), there is no evidence indicating that the Executive and the Senate expected courts in the United States to adjudicate private claims based on that treaty.

A. The Question of Whether a Treaty Creates a Judicially Enforceable Right Is Analytically Distinct From the Issue of Whether a Treaty is Self-Executing

This Court long has recognized that the questions of whether a treaty is self-executing and whether it allows individuals to seek judicial redress for its violation are analytically distinct questions. To say that a treaty is self-executing means only that no further legislative enactment is necessary for the treaty to have legal effect in the United States. In the case of the Vienna Convention, for example, the treaty is self-executing in the sense that police officials became obligated to inform persons under detention of the possibility of consular notification without further actions by Congress. To say that a treaty has *some* legal effect, however, does not mean that every person with an interest in the treaty's enforcement necessarily has the power to seek judicial relief for a violation. Rather, the courts of the United States must determine who has the authority to enforce a treaty and what remedies may be sought in light of what the treaty text expressly requires and what the Executive and the Senate intended in adhering to the instrument, interpreted against the general background practice of the political branches and the judiciary with regard to treaty enforcement.

At a minimum, a treaty should not be read as empowering private persons to obtain domestic judicial enforcement in circumstances where a domestic statutory enactment would not be interpreted as authorizing a private suit. As this Court has held on numerous occasions, a statute can have legal effect and still not delegate enforcement power to individuals. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. ___ (2005); *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *cf. Cannon v. University of Chicago*, 441 U.S. 671, 730 (1979) (Powell, J., dissenting).

Some of these cases involve the doctrine of implied private rights of actions, while others deal with the scope of specific legislation, particularly 42 U.S.C. § 1983. What they have in common, and what makes them relevant to the issue of treaty interpretation, is their recognition that legislative choices about enforcement mechanisms represent significant policy determinations that should not be preempted by the judiciary. The manifest capacity of Congress to provide expressly for private enforcement of its enactments often has persuaded this Court that it should not attempt to create an additional enforcement mechanism when Congress has not asked it to do so. The same logic applies to treaty interpretation.

Petitioners, in effect, seek a rule that would create a strong presumption in favor of implying judicial enforcement of treaties on behalf of private persons. The Brief for *Amici*

Curiae Law Professors in Support of Petitioners, at 5, argues in particular that:

> "[I]f an individual was harmed by a past violation of his primary treaty rights, or if he is likely to be harmed by a future violation of those rights, then the individual is entitled to a judicial remedy, even if the treaty itself does not create a private right of action, and even if the treaty says nothing about the capacity of individuals to invoke the treaty before a domestic court."

This proposal should be compared with the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975), which for some years was invoked by this Court as the basis for implying a private right of action from a statute. The proposal would go much further than did the now discredited *Cort* test, because it would mandate private enforcement even if only one of the *Cort* criteria were met, namely if the plaintiff is a member of a class for whose especial benefit a measure was adopted.

Yet the reasons for not implying a private right of enforcement from the unadorned language of a treaty provision are, if anything, stronger than those for not reading private enforcement rights into a statute. First, treaty rights by their nature involve the obligations of not just the United States, but of the other parties to the compact. Yet private judicial enforcement of treaty rights in other countries, absent clear and explicit provision, is unheard of. Thus, private enforcement in the United States would create a substantial asymmetry in the burdens borne by the United States. Second, treaty obligations, unlike statutes, cannot be amended unilaterally by the President and Congress. Rather, clarification of a treaty in light of a judicial determination that does not reflect the intent of the parties requires a new treaty negotiation and unanimous assent of all treaty parties. These institutional impediments to treaty adoption and implementation suggest that this Court should not lightly read private enforcement into treaties.

On numerous occasions Congress has provided expressly for private enforcement of treaty rights. The most common instance involves dispute settlement processes that have the capacity to produce monetary awards. The United States both has signed treaties with individual states to resolve particular disputes and joined multilateral regimes that create a means for addressing prospective controversies. In these instances, Congress has enacted separate legislation providing for the domestic recognition of the decisions of these tribunals. Where no separate authorizing legislation applied, this Court refused to give effect to a tribunal award. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute); *United States* v. *Blaine*, 139 U.S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51 (1888) (1871 Treaty of Washington); *Alling v. United States*, 114 U.S. 562 (1885) (1868 Mexico-United States Convention); *Great Western Insurance Co. v. United States*, 112 U.S. 193 (1884) (1871 Treaty of Washington); *Frelinghuysen* v. *Key*, 110 U. S. 63, 74 (1884) (1868 Mexico-United States Convention: "No nation treats with a citizen of another nation except through his government.").

Two modern multilateral regimes to which the United States is a party similarly reflect this pattern. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, provides for the recognition and enforcement of commercial arbitration awards. The United States both joined the treaty and enacted 9 U.S.C. §§ 201-07, which gives domestic force to the treaty rights by expressly authorizing judicial enforcement. Similarly, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270,

T.I.A.S. No. 6090, 575 U.N.T.S. 159, obligates the United States to give effect to arbitration awards in investment disputes. Congress then enacted a statutory provision enabling courts to enforce these awards. 22 U.S.C. §§ 1650, 1650a (2001). Significantly, Congress provided for the special case of enforcement of an international arbitral award against the United States with yet another statute, 28 U.S.C. § 2414 (2001), that gives the Attorney General the discretion to approve payment except in cases where, under authority provided by 22 U.S.C. § 1650a(b), a federal district court has ordered enforcement.

Whatever the practice of this Court in the period before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), when federal courts freely drew on a wide range of sources to craft rules of decision in federal cases, its modern practice has been not to infer an intention to authorize private enforcement of a treaty in the absence of either a separate statute or otherwise clear treaty language and manifest intent of the President and the Senate to do so. See, *e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (treaties not intended to create judicially enforceable private rights). It is this practice that provided the contemporary background to the decision of the President and the Senate to adhere to the Vienna Convention in 1969.

Express authorization of judicial enforcement of treaties is the norm; the instances since *Erie* where this Court has found that a treaty independently provides for private enforcement are rare. For example, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in note following* 49 U.S.C. § 40105 (2001), commonly known as the Warsaw Convention, addresses directly the rights of carriers, shippers and passengers engaged in international air transport, using mandatory language that is typical of private law statutes. Not surprisingly, the signatories to this Convention have treated it as supple-

menting the rules of law that courts can apply to private disputes. *E.g.*, *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (deriving rule of decision from Warsaw Convention in private litigation); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1999) (same). But nowhere has any signatory country's domestic court, much less this Court, inferred from the Warsaw Convention a power of a private person to seek judicial redress against a state that does not fully implement its obligations under the Convention.[1]

B. The Executive Branch's Interpretation of the Vienna Convention is Entitled to Great Deference

The Executive branch consistently has interpreted the Vienna Convention as not conferring judicially enforceable rights on criminal defendants. The State Department articulated this interpretation to the Senate in 1969, when the Convention was being considered for ratification, and in a letter to all 50 state governors immediately following ratification. See S. Exec. Rpt. No. 9, at 18 (1969) (quoting the State Department's representation that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing

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[1] *Amici* cite *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), as an instance where this Court implied a private right to judicial enforcement from executive agreements regarding the claims of Holocaust victims. Brief for Amici Curiae Law Professors in Support of Petitioners at 19-20. But, as this Court noted, the executive agreements at issue in *Garamendi* were not treaties, but rather an expression of the "foreign policy of the Executive Branch" with which a California statute interfered. 539 U.S. at 413. The significance of the policy of the Executive as a basis for preempting state law that interferes with its conduct of foreign relations rests on constitutional grounds that are independent of treaty interpretation. See, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Zschernig v. Miller*, 389 U.S. 429 (1968); *United States v. Pink*, 315 U.S. 203 (1942).

consular conventions."); *United States v. Li*, 206 F.3d 56, 64 (1st Cir. 2000) (quoting the State Department legal advisor's 1970 letter denying that "the Vienna Convention will require significant departures from the existing practice within the several states of the United States"). More recently, the State Department has emphasized that "such a statement would not have been made if the Department of State had contemplated that the [Vienna Convention] might require that failures of consular notification be remedied in the criminal process through prejudice hearings, and possibly the suppression of evidence or the undoing of other aspects of the criminal process." Department of State Answers to the Questions Posed by the First Circuit in *United States v. Nai Fook Li* (Oct. 15, 1999) (available at http://www.state.gov/documents/organization/7111.doc).

The Executive's representations to the Senate, the States, and the courts are mirrored in its actual practice implementing the Vienna Convention. As the Solicitor General explained just last year:

> The State Department's longstanding practice has been to investigate a country's complaint about the absence of notification. When a violation has been confirmed, the State Department has extended a formal apology to that country's government and sought to prevent a recurrence through educational efforts.

Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 22-23.

The State Department has taken an identical position on behalf of the United States when appearing before international tribunals. The first was Paraguay's suit in the International Court of Justice (ICJ) over Vienna Convention violations in the case of Angel Breard. Paraguay alleged that the Convention entailed an enforceable right to over-

turn Breard's conviction. The State Department, however, insisted that:

> "There is absolutely no support for this claim in the language of the [Vienna] Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties."

Verbatim Record (Paraguay v. U.S.), 1998 I.C.J. 426, at 3.20. Likewise, before the Inter-American Court of Human Rights, the Department argued that the Vienna Convention "does not require the domestic courts of State parties to take any actions in criminal proceedings, either to give effect to its provisions or to remedy their alleged violation." Written Observations of the United States of America, Request for Advisory Opinion OC-16, June 1, 1998 (corrected June 10, 1998).

Most recently, in its brief to this Court in *Medellin v. Dretke*, the United States reiterated that "[t]he Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence." Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 22-23; see also Brief for the United States as *Amicus Curiae* in Nos. 97-1390 and 97-8214, *Republic of Paraguay v. Gilmore* & *Breard v. Greene*, at 18-23 (taking the same position). The Executive's interpretation is thus emphatic, consistent, and longstanding. It has been advanced in legislative, judicial, and international fora, as well as in the State Department's day-to-day practice. And it is consistent with the Department's interpretation of other treaties that employ similar language to the Vienna Convention. See Brief for the United States as *Amicus Curiae* in No. 04-5928, *Medellin v. Dretke*, at 25-26 (discussing the International Convention for the Suppression of the Financing of Terrorism).

"Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). Judges Selya and Boudin have explained that this deference arises not only "because the State Department negotiates and administers such treaties," but also "because, when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President." *Li*, 206 F.3d at 67 (Selya & Boudin, JJ, concurring). Should this Court reject a position taken so emphatically and consistently by the United States in international fora, it would risk undermining the credibility of the Government in future litigation and negotiations. That risk should counsel deference to the Executive's consistent interpretation.

C. The Practice of Other States Confirms That No Judicially Enforceable Right Inheres in the Vienna Convention

There are only a handful of reported foreign judicial decisions about enforcement of the Vienna Convention. What precedent exists, however, indicates that criminally accused in other countries do not have the right to obtain independent judicial enforcement of the Vienna Convention.

The leading case is *Regina v. Partak*, 160 C.C.C. (3d) 553 (Ontario Sup. Ct. Jus. 2001), which involved a U.S. citizen whom Canadian police did not inform of his right to consular access when arresting him for murder. The Canadian court ruled that, although the police conduct had violated the accused's rights under Article 36 of the Convention, this violation did not give rise to any independent basis for judicial relief. Instead, the court applied the same standards applicable to a Canadian subject to determine whether the

accused had received proper notice of his right to counsel and had made a voluntary confession.

Similarly, a German court also assumed that Article 36 operated for the benefit of individuals but did not regard that provision as having any impact on the judicially enforceable rights of a criminal accused. *Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 7, 2001*, 5 BGHSt 116/0, *published in* NStZ 2002, 168 (F.R.G.). Moreover, German practice generally reflects the prevailing view of the means of enforcement of the Vienna Convention, namely that a state rectifies its violation of Article 36 by providing to its treaty partner an apology and assurance on future precautions. *See LaGrand (Germany v. United States)*, 2001 I.C.J. 104, at ¶ 63 (describing German practice).

Neither counsel for petitioners nor the many *amici* who have filed briefs in their support have discovered a single case where a foreign court has understood the Vienna Convention as obligating it to entertain private claims based on its violation.[2] Our research also has failed to uncover any such case. While the practice of other nations in the application of a multilateral treaty are not binding on this Court, they do provide substantial evidence of what the makers of that treaty intended. Here the practice of signatory states is fully consistent with the position that the Vienna Convention does not

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[2] The Brief of Former United States Diplomats as *Amici Curiae* in Support of Petitioners, at 20, cites the Canadian and German decisions discussed above as authority for the proposition that Canadian and German courts "have accepted as binding the ICJ's interpretation that the VCCR creates judicially enforceable rights." This is wrong. First, the Canadian decision contains no reference to any ICJ decision at all, and the German decision made no reference to the ICJ's views on judicial enforcement. Second, in each instance the court ruled that the Vienna Convention did not authorize national courts to provide any special remedies where the police failed to honor the notification obligation.

of its own force authorize national courts to entertain private efforts to enforce its obligations.

D. The Court Should Avoid an Interpretation of the Vienna Convention That Will Discourage the United States from Entering into New Treaty Commitments

The recognition by this Court of a private right to seek judicial enforcement of the Vienna Convention would do more than impose on the United States a burden that no other national court has placed on any state that adheres to that treaty. It would establish a precedent for implication of private enforcement of international treaties more broadly. Such a precedent would cast a pall on all future U.S. treaty negotiations, at least where the interests of individuals were potentially at issue.

Since the conclusion of World War II, the Executive and Congress have manifested a persistent concern that the assumption of international obligations by the United States would lead to new assertions of claims for judicial relief by private persons, with attendant uncertainty and potentially undesirable outcomes. During the 1950s the Senate came within a single vote of recommending a constitutional amendment that would have precluded any treaty from having any domestic legal effect. President Eisenhower at that time initiated a practice of reassuring the Congress that the Executive would not seek to use international agreements as a general means for changing domestic law. *See* Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475 (2001). Later administrations have adhered to this path.

On some occasions, the President and the Senate have taken extra measures to ensure that the judiciary does not interpret a treaty as creating new rights for which individuals can seek judicial enforcement. The practice of announcing

"reservations, understandings and declarations" (RUDs) at the time of signing or approving a treaty has become common since the Carter Administration. Typically a RUD contains a statement to the effect that the United States does not regard the treaty as operating independently of the existing mechanisms for protecting individual interests under U.S. law. For a comprehensive review of the practice, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

It would be wrong, however, to assume that the President and the Senate intend a treaty to create judicially enforceable private rights in all instances where a RUD is not made. First, the practice is precautionary and does not permit any negative inference. Second, some authorities have questioned whether it is even possible for a RUD to be effective. Not only have scholars argued that the Constitution forbids the President and the Senate from imposing any limitation on the domestic effect of an international treaty, *e.g.*, Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995), but at least some judges have embraced the argument. *E.g.*, *Igartua-De La Rosa v. United States*, 415 F.3rd 145, 189-90 (1st Cir. 2005) (Howard, J., dissenting).

Sound regard for the President's responsibility to conduct the international affairs of the United States requires a strong presumption that, in the absence of very clear treaty language and confirmatory evidence of party intent from the Executive and the Senate, treaty obligations do not create private entitlements to judicial relief. Any other rule is likely to reduce both the number and quality of international commitments that will be undertaken by the United States.

Nothing other than the national interest and a desire to ameliorate international problems compels the Executive to enter into treaty negotiations. The Senate historically has exercised its advise and consent power with great circum-

spection and often has refused to approve treaties that present a risk of unforeseeable domestic legal developments. The predictable outcome of a presumption in favor of private enforcement thus would be fewer and lesser treaties, undermining U.S. objectives in international cooperation.

These risks are illustrated by recent litigation over the Vienna Convention. Until 2005, the United States was a party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (Optional Protocol), a treaty that gave the ICJ the authority to hear disputes between parties to the Convention. Concerned that some U.S. courts might treat the decisions of the ICJ as a binding rule of decision that private persons could invoke in their lawsuits, the President decided to withdraw from the Optional Protocol.[3]

The building of international law through treaties and other international agreements is both critical and valuable. The President and the Senate must engage a fast changing, and not always benign, world with a full array of legal resources. This exercise of the foreign affairs power and the treaty power itself will be thwarted by appending an unpredictable set of civil lawsuits and criminal defenses to silent treaty texts. Criminal law enforcement in our constitutional system is handled by hundreds of thousands of federal, state, county, and local police officers. The potential disruption to thousands of criminal prosecutions, including grave crimes that involve victim's rights, is not to be lightly entertained.

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[3] Nor was this an idle fear. Months after the denunciation of the treaty, one Court of Appeals asserted that "we are of the opinion that the United States is bound by ICJ rulings in cases where it consented to the court's jurisdiction, just as it would be bound by any arbitral procedure to which it consented . . ." *Jogi v. Voges*, 425 F.3rd 367, 384 (7th Cir. 2005).

In recognition of these exigencies, this Court should clarify the law applicable to the domestic enforcement of treaties to make clear to the political branches what the international obligations that they contemplate will mean in terms of domestic consequences. In particular, this Court should support the constitutional role of these branches as the masters of our nation's international commitments.

II. NEITHER COMITY NOR THE NEED FOR UNIFORMITY IN TREATY INTERPRETATION JUSTIFIES A CONCLUSION THAT THE VIENNA CONVENTION FORBIDS A STATE FROM APPLYING A NEUTRAL PROCEDURAL RULE TO FORECLOSE UNTIMELY ASSERTIONS OF A CLAIM OTHERWISE ASSERTABLE UNDER THAT TREATY

Petitioners argue that this Court should follow the ICJ's interpretation of the Vienna Convention. Without warrant in the language of the Convention, the ICJ has asserted that Article 36 operates for the benefits of individuals, that the Convention entitles persons who have not received the requisite notification of a right to consular access to a judicial hearing as to whether the treaty violation has prejudiced them, and that this entitlement cannot be made contingent on timely assertion of the violation. All three of these interpretations are wrong. Moreover, no reason exists for this Court to privilege the interpretation of the ICJ over the interpretation consistently offered by the Executive.

A. The Doctrine of Comity Traditionally Has Been Applied to the Decisions of Foreign States, Not Those of an International Organization Created by Treaty

Petitioners argue that this Court must follow the ICJ's interpretation of the Vienna Convention as a matter of com-

ity. But this argument is inapplicable under the circumstances of this case.

First, the ICJ's interpretation cannot be reconciled with the language of the treaty or general international practice. Until the ICJ's decisions in the several Vienna Convention cases, no responsible decisionmaker had suggested that treaty commitments otherwise silent on the issue would override neutral and longstanding domestic rules regarding the timeliness of asserting claims and procedural default.

Second, the doctrine of comity, which has its origins in the Treaty of Westphalia and the concepts of sovereign power arising from the settlement of the Thirty Years War, applies to sovereigns, not to international bodies that themselves are the product of international agreements. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), clearly states that comity constitutes "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another *nation*." (emphasis added). This limitation on the doctrine of comity is not a mere formality: International law rests on the choices and behavior of states. An international organization such as the ICJ is a creature of the international instrument that creates it, and has only such authority as that instrument specifies, and hence the signatory states authorize. Extending the authority of an international body through common law doctrines such as comity undermines, rather than reinforces, the choices that signatory states made in the body's foundational instrument.

International law traditionally has involved rules created by states that constrain the otherwise unfettered exercise of national sovereignty. But an international organization such as the ICJ has no independent sovereignty, and thus nothing to surrender through international bargaining. Rather, an international body's authority is the product of bargaining among the states that create it. Comity, which grows out of both respect for another nation's sovereignty and an expec-

tation of reciprocity, thus has no bearing on an international entity such as the ICJ, which lacks both sovereignty and the capacity to act reciprocally.

Nor is the ICJ, in its role as an adjudicative body interpreting the Vienna Convention in the course of resolving inter-state disputes properly before it, analogous to a domestic agency charged with interpretation of a statute. We do not question the need for judicial deference to a domestic agency's exercise of the discretion left to it by Congress to elucidate the meaning of the statute that it administers. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). But an international court does not stand in the same position as does a domestic agency in its effect on the domestic law of the United States. There is no sound basis for inferring from any supposed ambiguity in treaty language a delegation to an international agency of the authority to provide an authoritative, binding interpretation of its meaning.

First and most important, the formulation of a statutory interpretation by a domestic agency is subject to numerous procedural and institutional constraints during its promulgation and can always be changed by a simple legislative enactment. An international organization, in contrast, does not have to comply with any requirements of public access and participation, nor indeed with the ethical rules appropriate to a constitutional democracy. More importantly, the United States cannot unilaterally correct or amend ICJ interpretations with which it disagrees. It only has the unpalatable alternative of withdrawing from a treaty, as it did with regard to the Optional Protocol. Congress, by contrast, can repudiate or revise any agency interpretation of domestic law with which it disagrees while leaving the underlying statutory scheme intact and certainly without incurring the international repercussions of a treaty abrogation.

Second, the mandate and composition of an international tribunal reflects the many and various national interests of the states that set it up. Although we must assume that establishment of a tribunal by a treaty to which the United States is a party reflects the best interests of the United States, it does not follow that the members of the tribunal have any ongoing obligation or incentive to act in ways that are compatible with U.S. goals and values. Rather, members are chosen by particular states and, even though they are not the official representatives of their national governments, often continue to reflect the perspective of those governments.[4]

Nothing in this Court's past decisions indicates a willingness to give special deference to the ICJ's interpretation of international law. On occasion this Court has regarded ICJ decisions as evidence of the content of international law in cases that depend on international law for their resolution. See, *e.g.*, *United States v. Maine*, 475 U.S. 89 (1986) (looking to 1951 ICJ decision as evidence of rule of decision to be applied in dispute over seabed ownership); *United States v. Louisiana*, 470 U.S. 93 (1985) (same). But it also has demonstrated a willingness to disregard or narrow claims based on ICJ judgments. See, *e.g.*, *Breard v. Green*, 523 U.S. 371, 375 (1998) (ICJ decision did not trump procedural rules of forum state).

The same approach should apply here. The opinion of the ICJ is one piece of evidence as to the content of the obligations that signatories to the Vienna Convention bear. This evidence cannot outweigh, however, the language of the Convention, the considered views of the Executive, the consistent practice of the signatory states, or clear indications

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[4] For recent scholarship presenting evidence that the judges on the ICJ vote in ways that broadly reflect the interests of the states that appoint them, see Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?* 34 J. LEG. STUD. 599 (2005).

of the understanding of the President and the Senate at the time that the United States approved the treaty.[5] All of these factors make clear that when the United States approved the Vienna Convention, it did not thereby endow persons accused of crimes in the United States with a new avenue to obtain judicial review of police actions.

B. Extending the Doctrine of Comity to an Organization Created by Treaty Would Discourage the United States from Agreeing to Establish Such Organizations

The creation of permanent international organizations based on treaties and other international agreements is one of the most important developments of the post-World War II period. The United Nations, the World Bank and the International Monetary Fund were established at the end of the War; many other bodies have followed since. Important recent examples include the World Trade Organization, established by an international agreement that Congress endorsed in 1994, and the International Criminal Court, founded by a treaty that the United States signed in 2001 but, following strong indications of opposition in the Senate, President Bush later indicated that the United States would

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[5] To the extent the legislative history of the Optional Protocol is relevant, one should note that a representative of the State Department explained in testimony before the Senate, regarding the legal effect of the Optional Protocol, "[i]f problems should arise regarding the interpretation or application of the convention, such problems would probably be resolved through diplomatic channels." Vienna Convention on Consular Relations, Sen. Exec. Rpt. 91-9, at 19 (1969) (Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration). Additionally, "*parties* to the optional protocol may agree to resort to . . . an arbitral tribunal" or conciliation. *Id* (emphasis added). Nothing in this testimony suggests that the United States anticipated that accession to the Optional Protocol would require U.S. courts to open up literally thousands of future criminal convictions to judicial challenge due to the ICJ's interpretation of the Vienna Convention.

not approve. Many of these organizations typically exercise an adjudicative function and purport to provide authoritative interpretations of the treaties or agreements on which they are based.

We do not question the value and importance of these kinds of international organizations, whatever the shortcomings of particular bodies. They permit states to develop organized, predictable and multilateral responses to global problems that overflow national boundaries. Their assertions about the meaning of particular treaties can guide the conduct of international actors and help to form a consensus. But if a consequence of setting up such an organization were a substantial possibility that U.S. courts would regard its pronouncements as authoritative or preclusive, then our political branches understandably would be wary of entering into new commitments, or of continuing adherence to prior agreements, that establish such adjudicative bodies.

In a few recent instances where the United States by legislative enactment consented to the delegation of certain adjudicatory functions to international organizations, Congress expressly provided that private persons could not invoke any aspect of the international agreement (including implicitly the interpretations of the presumably authoritative interpreters) in domestic court. *E.g.*, North American Free Trade Agreement Implementation Act of 1993, § 102(c) (codified at 19 U.S.C. § 3312(c)); Uruguay Round Agreements Act of 1994, § 102(c) (codified at 19 U.S.C. § 3512(c)); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005, § 102(c) (codified at 19 U.S.C. § 4012(c)). These particular instances indicate a more general unwillingness on the part of

Congress to invite domestic courts to exercise free reign in implementing the decisions of international tribunals.[6]

A decision by this Court to extend the doctrine of comity to the ICJ not only would run counter to these clear indications of the intent of the political branches, but would chill future efforts to create and empower international tribunals. The President and Congress, in the case of executive agreements, or the Senate, in the case of treaties, would not be able to ensure that establishment of such a body would not have unwanted ramifications in domestic law. As noted above, they have been unable to rely on the compliance of lower courts even in the face of express directions not to treat a treaty as creating judicially enforceable rights. Without a clear indication from this Court about the limited effect of international adjudication on domestic law, the political branches are likely to hold off from any future commitments in spite of their clear value.

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[6] In each of these three instances, Congress has provided for a narrowly tailored legal mechanism for domestic enforcement of the trade agreement. The United States is authorized to bring suit for prospective relief against state and local law or practice that violates U.S. obligations under the agreement. No other kind of litigation is permitted. North American Free Trade Agreement Implementation Act of 1993, § 102(b)(2) (codified at 19 U.S.C. § 3312(b)(2)); Uruguay Round Agreements Act of 1994, § 102(b)(2) (codified at 19 U.S.C. § 3512(b)(2)); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005, § 102(b)(2) (codified at 19 U.S.C. § 4012(b)(2)).

C. Other Countries Do Not Ordinarily Interpret Their Treaty Commitments as Delegating to International Organizations the Authority to Render Judgments in Particular Disputes To Be Enforced by Their Domestic Courts in the Absence of an Express Provision Stipulating Such an Effect

Petitioners argue that this Court should defer to the ICJ's interpretation of the Vienna Convention so as to promote uniform interpretation of that treaty. To the contrary, were this Court to regard the jurisprudence of the ICJ as obligating the judiciary of the United States to enforce the Vienna Convention at the behest of private persons, it would depart from, rather than reinforce, widely accepted international understandings about the relationship between international obligations and domestic law.

Other countries do not normally interpret a treaty acceding to the jurisdiction of an international tribunal as imposing on domestic courts the responsibility for enforcing the orders of such tribunals. The only significant exception to this principle is the case of the judicial bodies of the European Community. But the European Community constitutes a *sui generis* attempt to create an extensive legal regime embracing its member states, not a template for general international law. And even the European Court of Justice, the principal judicial body of the European Community, has rejected the possibility that it could act as an enforcing agent for any other international tribunal.

Considering first the International Court of Justice, our research has turned up no instance where a nation has embraced the principle of direct enforcement of ICJ orders. The universal practice is to regard ICJ decisions as important evidence of the content of international law in cases where such law is relevant to a matter otherwise before a national court, but not as independent grounds for a national court's

authority. Nations understand that their legislatures and governments, not their judiciaries, have the primary responsibility for effecting compliance with ICJ orders. We are unaware of any instance, and petitioner and the various *amici* in support of petitioner cite to no instance, where another state through a domestic court decision has mandated the direct enforcement of an ICJ order. For a comprehensive review of foreign judicial decisions rejecting direct enforcement of ICJ decisions, see A. Mark Weisburd, *International Courts and American Courts*,21 MICH. J. INT'L L. 877, 886-87 (2000).[7]

European practice regarding the European Court of Human Rights also is instructive. This international tribunal oversees compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, a treaty with 45 parties that protects basic human rights in the covered countries. Since 1998, individuals have had the right to bring a case directly to the European Court of Human Rights. But enforcement of its judgments, including orders for compensation, depends entirely on local law, not the Convention itself. In the United Kingdom, for example, it is the Human Rights Act 1998, ch.

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[7] *Amici* intimate that Belgium has given direct effect to an ICJ decision involving the immunity from arrest of government officials. Brief of International Court of Justice Experts as Amici Curiae in Support of Petitioners at 26 n.46. But the Belgium courts grounded their decisions on their interpretation of domestic law. See Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 270 (2004); Alain Winants, *The* Yerodia *Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction*, 16 LEIDEN J. INT'L L. 491, 505-06 (2003); Jan Wouters, *The Judgement of the International Court of Justice in the* Arrest Warrant *Case: Some Critical Remarks*, 16 LEIDEN J. INT'L L. 253, 266 (2003) (Belgian Supreme Court decision rested on Belgian statute). *Amici* wishes to substitute speculation by scholars about the motivation of these decisions for what the courts actually said.

42 (Eng.), that provides the legal basis for domestic enforcement of the Convention. For a recent discussion of the relationship between the Convention and British law, see *A v. Secretary of State*, [2005] 2 A.C. 68, ¶ 42 (H.L. 2004). Even European nations whose constitutions subordinate domestic legislation to international law, such as Germany, Italy, and the Netherlands, do not give direct effect to the judgments of the European Court of Human Rights. For a thorough discussion of practice in these countries, see THE EXECUTION OF STRASBOURG AND GERMAN HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (Tom Barkhuysen et al. eds. 1999).

The European Union (EU) and the European Community (EC), the EU's principal institutional structure, rest on treaties which, in the case of the European Community, create judicial bodies. The parties to these treaties do regard the decisions of the judiciary of the European Community, namely the European Court of Justice (ECJ) and the ECJ's Court of First Instance, as generally creating judicially enforceable interests in their domestic legal order. See, *e.g.*, *Regina v. Secretary of State for Transport ex parte Factortame Ltd.*, [1991] 1 All E.R. 70 (H.L.). But cf. *Brunner v. The European Union Treaty*, [1994] 1 C.M.L.R. 57 (German Federal Constitutional Court) (reserving right to review decisions of ECJ for compliance with German constitutional order). This outcome, however, results not from an abstract sense of obligation to comply with the orders of international tribunals, but rather because of explicit provisions in the treaty constituting the EC. Consolidated Version of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. (C 325) 33, Articles 228, 244, 256. These articles expressly impose on domestic courts the obligation to carry out the orders of the ECJ.

The direct enforcement of ECJ decisions by the member states does not represent a new approach generally to

domestic incorporation of international law. The EC involves a distinctive, perhaps unique, level of extensive and intensive cooperation among the members, who in a sense have formed a new confederation of member states. Direct enforcement of the ECJ's decisions facilitates that cooperation, much like the decisions of this Court promote the smooth workings of our federal union. Rather than serving as a new model of international adjudication, the ECJ operates in relation to the legal system of the member states much as this Court does with respect to the legal systems of the several States.

The ECJ's approach to international law (the foundational treaties of the EU and the EC aside) closely resembles the traditional perspective of this Court. Like this Court, the ECJ recognizes that the decisions of international tribunals are informative, but that treaty provisions obligating the EC to submit disputes to a tribunal do not mean that the decisions of those tribunals become part of EC law. In particular, the ECJ considers the decisions of the ICJ as evidence of the content of international law in cases where it must look to international law for a rule of decision but retains independent competence to determine whether the international rule at issue has become part of the body of EC law. See, *e.g.*, *A. Racke GmbH & Co. v. Hauptzollamt Mainz (Case C-162/96)*, 1998 E.C.R.I-3655; *Anklagemyndigheden v. Poulsen (Case C-286/90)*, 1992 E.C.R. I-6019. Cf. Rosalyn Higgins, *The ICJ, the ECJ, and the Integrity of International Law*, 52 INT'L & COMP. L.Q. 1 (2003) (explaining relationship between ECJ and ICJ).

As we discussed above, no signatory to the Vienna Convention has regarded that treaty as an exception to the general pattern of no private judicial enforcement of treaty obligations. This Court should uphold the Executive's consistent understanding of U.S. obligations under that treaty and refuse to imply a private right to judicial enforcement.

CONCLUSION

The Vienna Convention does not give private persons the power to challenge in court alleged violations of its provisions. A decision to the contrary would have a serious negative impact on the willingness of the political branches to enter into new treaties and create new international organizations with adjudicative functions. The course urged on this Court by petitioners, far from bringing U.S. practice into conformity with that of other nations, would give international law and the decisions of international tribunals a role in the U.S. legal system that other nations do not allow their courts to undertake. Accordingly, the judgments of the Supreme Court of Oregon and the Supreme Court of Virginia should be affirmed.

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IN THE

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Supreme Court, U.S.
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MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

OREGON,
Respondent.

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF OREGON AND THE SUPREME COURT OF VIRGINIA

BRIEF FOR *AMICI CURIAE* REPUBLIC OF HONDURAS AND OTHER FOREIGN SOVEREIGNS IN SUPPORT OF PETITIONERS

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Amici curiae Republic of Honduras, Argentine Republic, Republic of Bolivia, Federative Republic of Brazil, Republic of Chile, Republic of Colombia, Republic of El Salvador, Republic of Guatemala, Republic of Peru, and Oriental Republic of Uruguay respectfully submit this brief in support of the petitioners in these cases.[1]

INTEREST OF *AMICI CURIAE*

Each *amicus*, like the United States, has adopted the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("Vienna Convention" or "Convention"). In addition, *amici* Argentina, Chile, Colombia, Peru, and Uruguay are signatories to the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 488 ("Optional Protocol"). The United States was, until earlier this year, also a signatory to the Optional Protocol.

Article 36(1)(b) of the Convention provides that a signatory state that detains a foreign national must, upon request of the detainee, promptly inform the foreign national's consulate of the detention, and also must promptly advise the detainee of "his rights" to consular notification under the Convention. Article 36(2) of the Convention provides that signatory states must ensure that their laws and regulations give "full effect" to the protections afforded by Article 36(1) of the Convention.

These protections are of critical importance to *amici*. Hundreds of thousands of *amici*'s citizens reside in the United States,[2] and many more visit every year. Article 36 ensures that those foreign nationals may receive the benefit

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for all parties consented in writing to the filing of this brief.

[2] *See, e.g.*, Table FBP-1, *Profile of Selected Demographic and Social Characteristics: 2000*, *available at* http://www.census.gov/population/cen2000/stp-159 (last visited Dec. 21, 2005).

of consular assistance when they are confronted with criminal proceedings in surroundings that may be unfamiliar to them. Unless a detained individual receives prompt notification that he may seek consular assistance, that benefit is often lost and his ability to mount an effective defense may well be hindered.

The Optional Protocol is also of great importance to the *amici* who are signatories to that agreement. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol art. 1, 21 U.S.T. at 325. The Optional Protocol thus provides a means within the established framework of international law whereby parties to the Convention may resolve their differences over the interpretation and application of the Convention, with the understanding that, once the International Court of Justice ("ICJ") renders a decision, those parties will abide by that decision in the future. Moreover, the ICJ was given jurisdiction not only to decide whether any country had violated the Convention, but also to resolve any dispute over the *interpretation* of the Convention—indicating that parties that agreed to submit disputes to the ICJ (including, previously, the United States) would thenceforth be bound by that court's "interpretation" of the treaty.

The cases before the Court, both of which involve conceded violations of the Vienna Convention by state officials, raise the question of whether and how the United States will comply with the Vienna Convention, and in particular whether and how the United States will provide an effective remedy for *amici*'s citizens who have been prejudiced by violations of the Convention. More broadly, these cases underscore the importance of treaty obligations to *amici* in their relations with the United States. Compliance with treaty obligations reinforces the principle of reciprocity that is the bedrock of international relations. When *amici* enter into treaties with the United States, they rely on the international law principle that treaties will be followed—the

cardinal rule of *pacta sunt servanda*. And although *amici* are well aware of the federal system of government in the United States, they necessarily depend on the domestic law principle that ensures that treaties will be honored at all levels of government in the United States—the U.S. Constitution's Supremacy Clause, which provides that "all Treaties made . . . under the authority of the United States, shall be Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

SUMMARY OF ARGUMENT

Consular relations by nature often involve protection of the interests of individuals. Thus, the Vienna Convention, which codified the law of consular relations, offers significant protections for individuals traveling and living abroad. Consular assistance helps an individual overcome the substantial obstacles he may face in understanding and navigating an unfamiliar criminal justice system. The United States has continuously demonstrated its support for these protections—at the Vienna Convention itself and in cases involving Vienna Convention violations relating to U.S. citizens.

The ICJ has issued several decisions interpreting the Vienna Convention. In particular, it has held that at least in criminal cases involving "severe penalties," judicial remedies must be available to the individual whose rights have been violated. Specifically, the ICJ has ruled that the Vienna Convention creates individually enforceable rights and that judicial remedies for violations of these rights cannot be barred by state procedural default rules. *See Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 21); *see also LaGrand Case* (*F.R.G.* v. *U.S.*), 2001 I.C.J. 466 (June 27).

Whether or not the ICJ's *Avena* decision on the interpretation of the Convention binds this Court, principles of reciprocity, comity, and uniformity of treaty interpretation all favor following that decision. The Vienna Convention,

like other treaties, is built on the assumption that all nations will comply. Its drafters anticipated that parties would accord great weight to the ICJ's interpretations and applications of the Convention. This Court's cases concerning treaty interpretation also favor adhering to judicial constructions of treaties rendered by international courts, in recognition of the principle that parties to multilateral treaties desire uniform interpretations of those treaties.

The plain language of the Vienna Convention supports the ICJ's determination that the treaty does create individually enforceable rights. Logic dictates the same result. Despite federal efforts to ensure compliance, violations by state officials persist. Individual judicial remedies for such violations are therefore necessary if these protections are to have their intended effect.

The same principles of reciprocity, comity, and uniformity also support a holding by this Court that state procedural default rules will not bar claims under the Vienna Convention. The ICJ has so concluded and its order is supported by the nature of the right itself. The Vienna Convention requires states to inform detained individuals of their rights; in the case of a violation, the individual will not be informed of his or her rights and cannot be expected to raise such claims at trial. Moreover, the significance of the violation may become clear only after the trial is over.

The Court's opinion accompanying the denial of certiorari in *Breard* v. *Greene*, 523 U.S. 371 (1998) (*per curiam*), which addressed the question of procedural default, should not be followed in these cases. *Breard* did not address the questions of individually enforceable rights and suppression that are also before the Court. Also, the *Breard* opinion was issued before the ICJ had interpreted the Vienna Convention. It has now done so, in two adjudications to which the United States was a party. The ICJ's determination counsels in favor of the renewed assessment of the questions discussed in *Breard*. Moreover, *Breard* was not rendered after full briefing and argument on the merits, but was issued in exigent circumstances immediately before Breard's execu-

tion, and, moreover, the Court's statements about procedural default were not essential to the opinion.

These cases aptly demonstrate the enormous value of the rights secured by Article 36. In *Bustillo*, the Vienna Convention violation prevented Bustillo from securing substantial exculpatory evidence available to the consulate. In *Sanchez-Llamas*, the Vienna Convention violation denied Sanchez-Llamas the opportunity to have consular assistance in understanding his *Miranda* rights; his apparent lack of comprehension led to a confession of questionable reliability.

ARGUMENT

A. Article 36 Is A Critical Part Of The Traditional Consular Function Of Protecting The Interests Of A Sending State's Nationals

An important focus of the consular function is and always has been the protection of the interests of a sending state's nationals who reside in or are visiting a receiving state. Thus, in adopting the Vienna Convention, which codified the principles underlying consular relations, the parties recognized the role of consular relations "in promoting the development of friendly relations among nations, and ensuring the protection and assistance for aliens resident in the territories of other states." *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*U.S.* v. *Iran*), 1980 I.C.J. 3, 40 (May 24) ("*Diplomatic and Consular Staff*").

Article 5 of the Vienna Convention lists various consular functions, many of which advance and protect the interests of the sending state's nationals. Most pertinent to these cases, Article 5(e) states that a central consular function is "helping and assisting nationals, both individuals and bodies corporate, of the sending states." 21 U.S.T. at 83. Article 36 facilitates this "help[]" and "assist[ance]" by prohibiting receiving states from impeding communications between consular officials and nationals of the sending state. Specifically, Article 36(1)(a) provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them," and that "[n]ationals of the

sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State." *Id.* at 101. Other articles of the Vienna Convention similarly address the interests of individual nationals of sending states. *See, e.g.*, Article 5(d), 21 U.S.T. at 83 (regarding the issuance of travel documents to individuals); Article 5(h), 21 U.S.T. at 83, (respecting the safeguarding of the interests of minors); Article 37, 21 U.S.T. at 102 (concerning assistance in the case of "deaths, guardianship or trusteeship, wrecks and air accidents").

The parties to the Convention anticipated that nationals of sending states would be particularly in need of consular assistance when they were detained on charges in a receiving state. To ensure that their nationals would be able to obtain the benefit of consular assistance in such circumstances, the Convention requires detaining authorities specifically and promptly to inform detained foreign nationals of their right to contact their consulate for assistance:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Art. 36(1)(b), 21 U.S.T. at 101. Article 36 further provides that consular officers have the right to visit the national in prison "to converse and correspond with him, and to arrange for his legal representation." *Id.* Furthermore, although these rights "shall be exercised in conformity with the laws and regulations of the receiving State," all states' laws and regulations must give "full effect" to the purposes for which the rights at issue were created. *Id.*

These provisions reflect the signatories' judgment that "[d]etained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." Luke Lee, *Consular Law and Practice* 145 (2d ed. 1991) (quoting U.S. Dep't. of State, Telegram 40298 to Embassy Damascus, Feb. 21, 1975). For example, United States nationals detained abroad may not understand the function of magistrates, who play a much greater role in criminal prosecutions than do judicial officers in the Unites States.[3]

Conversely, detained foreign nationals may find many aspects of the U.S. criminal justice system deeply puzzling. Foreign nationals may not understand the importance of statements given during police interrogations.[4] They also may not understand the function of a public defender or appointed attorney, who represents the client's interests despite being paid by the state. *See Polk County* v. *Dodson*, 454 U.S. 312, 322 (1981). Therefore, they may not meaningfully apprehend the promise of the *Miranda* statement that an attorney will be appointed for a defendant who cannot afford representation. Likewise, they may not understand the central role of plea-bargaining in the U.S. criminal justice system, including the fact that a guilty plea establishes the defendant's guilt just as definitively as a guilty verdict at trial. *See Bradshaw* v. *Stumpf*, 125 S. Ct. 2398, 2405-2407 (1995). And if a foreign national is convicted, it may be ex-

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[3] *See, e.g.*, Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial For an American Murder in the French Cour D'Assises*, 2001 U. Ill. L. Rev. 791, 800-806; *see generally* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506 (1973) (contrasting the Anglo-American adversarial system with the inquisitorial system).

[4] As *amicus* Mexico notes (Br. 10-11), under the laws of some other nations, statements given to the police outside the presence of a magistrate or public prosecutor are not admissible against the defendant at trial. A citizen of such a nation who was detained in the United States might be surprised to discover that his statement to the police may well serve as a crucial piece of evidence against him in a criminal case.

ceptionally difficult for him to understand the process of pursuing an appeal, including whether he needs to obtain new counsel. *Cf. Halbert* v. *Michigan*, 125 S. Ct. 2582, 2592-2593 (2005).

Consular officials can help detained foreign nationals navigate the waters of the criminal justice system and thereby help them secure their rights within that system. Of particular importance is the consulate's ability to help locate culturally sensitive counsel who can translate unfamiliar aspects of the receiving state's criminal justice system to the detained individual. Consular officers also can communicate with the prosecuting authorities, perhaps presenting reasons not to seek the death penalty in capital cases. The consulate can help identify and locate evidence that is in the home country and inaccessible to the detained foreign national's lawyer. Such evidence may include exculpatory evidence or mitigating evidence for use in capital cases (*e.g.*, school records or other evidence about the defendant's early experiences of the kind frequently introduced in capital cases). Finally, consular officials may monitor proceedings to ensure compliance with international standards; indeed, many countries publish specific guidelines for such monitoring.[5]

The importance of these kinds of consular assistance should not be underestimated. The State Department has repeatedly recognized the "essential function" of the Vienna Convention in protections nationals who travel to foreign countries. 7 *Foreign Affairs Manual* § 411 (1984), *available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0. The Department explained:

> One of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling

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[5] For example, the State Department's guidelines state that its consular officials must attend trials, protest discrimination, and monitor the well-being of the individual incarcerated. *Consular Law and Practice* 125.

> or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id. § 401; *see also id.* §§ 400-426.2-1 (2004) (recognizing the role of the consulate in aiding the national unfamiliar with the foreign legal system).

B. Reciprocity, Comity, And Uniform Treaty Interpretation Principles Counsel In Favor Of Adhering To The ICJ's Interpretation Of The Vienna Convention

The U.S. government has argued, to both the ICJ and this Court, that Article 36 of the Convention does not create or secure individual rights, and that a violation of that Article's consular notification provision may not be remedied in the criminal justice system but only through state-to-state adjustment, such as a formal apology.[6] Whatever the merits of these submissions may have been before the *Avena* ruling, they come to this Court in a decidedly different posture now. In *Avena*, the ICJ fully examined and then rejected those contentions. After extensively examining the text and purpose of Article 36, the ICJ concluded that that Article does indeed create "individual rights," and that the detaining state must permit a criminal conviction to be judicially re-examined, where a violation of a detained foreign national's right to consular notification under that Article may have prejudiced him in a criminal prosecution, resulting in "severe penalties." *See Avena*, ¶¶ 139-143.

Reciprocity, comity, and uniformity, which form the underpinnings of international law, favor adherence to the

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[6] *See* Counter-Memorial of The United States of America 74-78, *Case Concerning Avena and Other Mexican Nationals* (*Mex.* v. *U.S.*), (Nov. 3, 2003), *available at* http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm; Brief for the United States as *Amicus Curiae* 33-38, *Medellin* v. *Dretke*, 125 S. Ct. 2088 (2005) (*per curiam*) (No. 04-5928); *see also Medellin*, 125 S. Ct. at 2104-2105 (O'Connor, J., dissenting).

ICJ's interpretation of the Convention in *Avena*. To reach that conclusion, this Court need not decide that, strictly speaking, either the United States as a general matter or this Court in particular is "bound" by the ICJ's construction of that treaty in cases, such as these, that do not involve the specific individuals at issue in *Avena*. Nor need this Court conclude that the ICJ's reading of the Convention is the only possible correct one. Rather, it is sufficient to observe that the ICJ's decision is entitled to great weight because it is fully consistent with the principles underlying Article 36 in particular and the Convention in general, and it enjoys broad support in the international community—as demonstrated by the significant level of support shown for that decision in *amicus curiae* briefs in this Court.

1. The Vienna Convention—like all treaties—rests on the fundamental norm of reciprocity. This principle lies at the heart of international law and international relations. As this Court has long acknowledged, "international law obligations are of necessity reciprocal in nature." *United States* v. *Arjona*, 120 U.S. 479, 487 (1887); *see also Hilton* v. *Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity . . . ."). The heart of this reciprocity principle is the idea that "what is law for one is, under the same circumstances, law for the other." *Arjona*, 140 U.S. at 487. This principle strongly suggests that, where, as here, numerous other parties to the Convention understand a particular practice to be essential to full compliance with the Convention, the United States should adopt that understanding as well. Where "postratification understanding" of other contracting parties supports one reading of a treaty over another, that understanding is to be preferred. *See Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

Reciprocity is a particularly important principle in a multilateral treaty, such as the Convention, that protects the interests of individuals. Millions of American citizens live and travel around the world secure in the belief that agents of their government will be available to assist them in the

event they are detained abroad. They enjoy such security precisely because other nations trust the United States to comply with its treaty obligations in turn and to afford the same protections to their citizens who visit the United States. Should any nation that is a party to the Convention consistently fail to comply with its obligations under that treaty, the mutual trust and sense of obligation underpinning the Convention could unravel.

For its part, the United States has consistently sought to strengthen the protections offered by the Vienna Convention. In cases before the ICJ and elsewhere, the United States has emphasized the vital importance of the safeguards that the Convention offers United States citizens detained by another signatory to the Convention. Thus, when Iran seized the United States embassy and detained embassy personnel, the United States argued to the ICJ in the *Diplomatic and Consular Staff* case that "a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason, the channel of communication between consular officers and nationals must at all times remain open." Memorial of the United States, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, (*U.S.* v. *Iran*), 1980 I.C.J. Pleadings 174 (Jan. 12).

The United States has assertively challenged other governments that fail to provide consular rights to detained American citizens. When Syria detained two United States citizens, the State Department used the Convention to gain access to these individuals. *See* William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 271 (1998). The United States complained of the violation of the Vienna Convention, stating: "The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations." *Consular Law and Practice* 145. In so doing, it stressed "considerations of re-

ciprocity" and the fact that the United States would certainly abide by its obligations in the reverse scenario. *Id.*[7]

But the United States has also recognized that its concern for protecting the rights of Americans abroad requires it to have a federal policy of attentive support for consular rights domestically. As the State Department has explained to state and local law enforcement agencies:

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.[8]

2. Closely connected to the reciprocity principle is the principle of comity. Comity has been aptly described as "a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill." *See Société Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part). Comity favors an approach that "furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among

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[7] In one case, the United States complained about a Vienna Convention violation—the detention of two Americans for 32 hours—even after the individuals were released. *Consular Law and Practice* 145, 149. The United States' commitment to protecting its citizens' right to consular notification and access is sufficiently deep that the State Department as a matter of policy and procedure requires local consular officials to protest if they learn of an American citizen who is detained without consular notification for more than 72 hours. *See* 7 *Foreign Affairs Manual* § 426.2-1 (2004).

[8] U.S. Dep't of State, *Consular Notification and Access* 13 (2003), *available at* http://travel.state.gov/pdf/CNA_book.pdf.

them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations." *Id.* at 557.

The principle of comity favors adherence to the ICJ's interpretation of the Vienna Convention in *Avena*. The Optional Protocol designated the ICJ—a widely respected institution on which the world's leading scholars of international law have served—as a leading institution with competence to adjudicate disagreements between sovereigns about the treaty's proper scope and meaning. Optional Protocol art. 1, 21 U.S.T. at 326. Thus, the drafters of the Convention and the Optional Protocol clearly intended the ICJ to have a leading role in interpreting and applying the Convention. While that role is not exclusive—national courts may frequently have occasion to interpret and apply the Convention—ICJ decisions on the Vienna Convention quite properly have a unique force, for the ICJ represents, in effect, a court of last resort for parties that differ over the meaning of the Convention. Moreover, parties historically have invoked the ICJ's jurisdiction only in cases of surpassing importance, giving its decisions even greater weight.[9] Indeed, when the occasion demanded it, the United States turned to the ICJ to resolve the Article 36 dispute in the *Diplomatic and Consular Staff* case arising out of the seizure of the U.S. Embassy in Teheran.

3. Finally, the principle of uniform treaty interpretation, recognized in several of this Court's treaty cases, favors adherence to interpretations of treaties rendered by foreign and international courts. Thus, even though the United States has withdrawn from the Optional Protocol,

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[9] *See* Gerald P. McGinley, *Ordering a Savage Society: A Study of International Disputes and a Proposal for Achieving Their Peaceful Resolution*, 25 Harv. Int'l L.J. 43, 44-46 (1984) (sovereigns do not invoke the ICJ's jurisdiction lightly); *see also* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1, 34-41 (2005) (compiling data on ICJ action and concluding that states rarely invoke its jurisdiction).

the ICJ's *Avena* decision, rendered while the United States was a party to that Protocol, nonetheless retains strong persuasive force—as indeed it would have even if the United States had never adhered to the Optional Protocol in the first instance. This Court has long paid special heed to treaty interpretations rendered by foreign and international courts. As this Court noted in *Breard*, "we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." 523 U.S. at 375. In cases involving treaty interpretation, it is commonplace for this Court to review and adhere to decisions of foreign courts interpreting the relevant provisions, even though the Court might not be bound by those decisions. *See, e.g., El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 175-176 (1999) (noting that decisions rendered by of courts of other signatory nations are entitled to "considerable weight"); *Air France* v. *Saks*, 470 U.S. 392, 402-403 (1985) (same).

One important reason for giving great weight to foreign and international courts' treaty interpretation is that treaty drafters are generally presumed to desire a *uniform* construction of a treaty, and so "their respective courts should strive to interpret the treaty consistently." *Olympic Airways* v. *Husain*, 540 U.S. 644, 661 (2004) (Scalia, J., dissenting). Uniformity of application and interpretation is especially important in a multilateral treaty like the Vienna Convention, which cannot be easily amended if the signatories' interpretations and applications diverge.[10] It would certainly advance the parties' expectation of uniformity for this Court to follow the ICJ's *Avena* decision. A contrary con-

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[10] Given that the policy of uniformity counsels in favor of this Court's following the lead of other countries' courts that have construed a treaty even when no supranational institution is empowered to construe the treaty—as the Court has done in its Warsaw Convention cases—it has even greater import in a case involving the Vienna Convention, where many of the parties to the treaty (including, at the time the treaty was signed, the United States) agreed to establish the ICJ as a leading expositor of the meaning of the treaty.

struction of Article 36 by this Court, by contrast, would greatly undermine the goal of uniformity and would raise the possibility that the United States was in continuing non-compliance with the Convention. *Amici* respectfully submit that, to avoid that prospect, the Court should adopt the ICJ's reading of Article 36.

C. Article 36 Of The Vienna Convention Creates Individually Enforceable Rights

The U.S. government's argument that the consular notification and access provisions of Article 36 do not create individually enforceable rights is difficult to square with the plain language of Article 36(1)(b). That provision first sets forth the requirement that detaining authorities in the receiving state inform the consulate without delay of the detention of one of its nationals (if the detained person so requests). It then requires the detaining authorities to "inform the person concerned without delay of *his rights* under this sub-paragraph." Article 36(1)(b), 21 U.S.T. at 101 (emphasis added.) The drafters of the Convention thus conceived of the consular notification and access requirements as individual rights of detained persons. *See Avena*, ¶¶ 40, 140, 153 (concluding that Article 36 creates individual rights); *see also Breard*, 523 U.S. at 376 (observing that the Convention "arguably confers on an individual the right to consular assistance following arrest"). That is hardly a surprising conclusion, for, as discussed in Section A, *supra*, consular relations by nature often involve protection of the interests of individuals.

If violations of the Vienna Convention were highly infrequent or largely a thing of the past, then there might be little cost to adopting a reading of the Convention that does not create individually enforceable rights. In fact, although the State Department has made commendable efforts to encourage local law enforcement officers to fulfill their Vienna

Convention obligations,[11] those efforts have not yielded the hoped-for results. The numerous reported cases involving allegations of Convention violations suggest that the problem persists.[12] These continued violations have substantial practical import for signatory nations and their nationals in the United States, where state criminal justice proceedings regularly involve foreign nationals. In 2000, over 5% of state prisoners, or more than 56,000 individuals, were not U.S. citizens.[13]

Given that the State Department's outreach efforts have not yielded demonstrable improvement in state compliance, experience teaches that Article 36 will have its intended effect only if judicial remedies are available to individuals whose rights under the Convention have been violated. Local law enforcement authorities, unfortunately, have little incentive to ensure that those rights are scrupulously respected, and may well view the involvement of the consulate as a nuisance. And while the federal government must deal on an ongoing basis with the disappointment of foreign sovereigns whose nationals have not been informed

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[11] In 1998, the State Department issued guidelines to encourage local law enforcement officials to fulfill their Vienna Convention obligations. *See Consular Notification and Access*, *supra* n.8.

[12] *See, e.g.*, *Ramirez* v. *State*, 619 S.E.2d 668, 673 (Ga. 2005); *Sorto* v. *State*, 173 S.W.3d 469 (Tex. Crim. App. 2005), *State* v. *Byron*, 683 N.W.2d 317, 323 (Minn. Ct. App. 2004), *United States* v. *Gonzales*, 339 F.3d 725, 729 (8th Cir. 2003); *United States* v. *Cazares*, 60 Fed. Appx. 223, 226 (10th Cir. 2003) (unpublished); *United States* v. *Guerrero*, 45 Fed. Appx. 265, 266 (4th Cir. 2002) (unpublished); *United States* v. *Ortiz*, 315 F.3d 873, 881 (8th Cir. 2002); *United States* v. *Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002); *United States* v. *Contreras-Cortez*, 41 Fed. Appx. 252, 255 (10th Cir. 2002) (unpublished); *United States* v. *Emuegbunam*, 268 F.3d 377, 387 (6th Cir. 2001); *United States* v. *Felix-Felix*, 275 F.3d 627, 632 (7th Cir. 2001); *United States* v. *Minjares-Alvarez*, 264 F.3d 980, 983 (10th Cir. 2001); *United States* v. *Beckford*, Nos. 97-4924 et al., 2000 U.S. App. LEXIS 6752, at *40 (4th Cir. Jan. 28, 2000) (unpublished).

[13] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities, 2000, at vi, 8 & tbl. 14, *available at* http://www.ojp.usdoj.gov/bjs/abstract/csfcf00.htm.

of their rights to contact the consular post, the State Department and the Justice Department cannot intervene directly in state criminal prosecutions or sanction local law enforcement officials who decline to observe the Convention's requirements. Only a judicial remedy, therefore, will ensure that detained foreign nationals are promptly informed of their right to contact the consulate—as the Convention unambiguously requires.

Law enforcement officials are no doubt concerned that judicial enforcement of individual rights under the Convention will diminish the prospects for convictions on criminal charges. But *amici* ask the Court to do nothing more than ensure that the Convention's requirements are observed. The Convention exists precisely because its drafters recognized that special concerns arise when a national of one state faces serious criminal charges in the courts of another state. This is as true abroad as it is in the United States. An American citizen detained overseas, especially in an unfamiliar setting, would want reassurance about the nature of the proceedings against him, and the United States government would want to be certain that those proceedings would not result in an unwarranted conviction because the American citizen did not understand that he could ask his consulate for help. So too, the United States' judicial system should ensure that a foreign national, who may speak little or no English and who may be unfamiliar with the American criminal justice system, receives the full measure of assistance available to him. Individual enforcement of the rights secured under Article 36 is necessary to ensure that those rights are consistently honored.

D. The Rights Afforded Under Article 36 Are Not Subject To State Procedural Default Rules

A central question in the *Bustillo* case is whether a defendant should be precluded from challenging his conviction on the ground that his Vienna Convention rights were violated if he did not raise that issue at or before trial. The Virginia courts, applying the state law of procedural default, declined to entertain Bustillo's Vienna Convention claim on

the ground that Bustillo had defaulted on that claim. *Amici* respectfully submit that state procedural default rules should not bar Vienna Convention claims for two reasons: first, enforcing those rules after *Avena* would violate the reciprocity and comity principles discussed above; and second, a procedural default rule is inconsistent with the nature of the right itself.

1. In *Avena*, the ICJ ruled that the Vienna Convention bars the application of state procedural default rules that would preclude judicial review and reconsideration of a criminal conviction against an individual whose rights to consular notification and access were violated. *See Avena*, ¶¶ 112, 121. This Court should follow the ICJ's lead and hold similarly. For the reasons articulated above, the same interests in comity, reciprocity, and uniformity favor a ruling in accordance with that of the ICJ. This Court should rule in a way that gives full effect to the Vienna Convention, reflecting its status as controlling law in the United States and out of respect for the ICJ judgment and interpretation of that treaty.

Although it is certainly true that, ordinarily, even federal constitutional claims are defaulted unless raised at trial, *see Breard*, 523 U.S. at 376, rights based in multilateral treaties such as the Vienna Convention raise different considerations. The application of state procedural default rules to rights grounded in multilateral treaties would raise serious questions about the United States' compliance with international law—especially now that the ICJ has concluded that such procedural default rules may not be applied. In effect, each time that a state court refuses to entertain an otherwise meritorious Vienna Convention claim based on a procedural default rule, that court places the United States in violation of its international obligations as determined by the ICJ, above and beyond the initial violation committed when the foreign national was not informed of his rights as required by Article 36.

This Court should hesitate to approve a regime under which a state court could so readily place the United States

in violation of international law. The Court has frequently stated that international relations and the structure of the Constitution require that the federal government be able to "speak with one voice" in its dealings with other countries. *See, e.g., American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-414 (2003); *United States* v. *Pink*, 315 U.S. 203, 242 (1942); *see also* The Federalist No. 80, at 535-536 (J. Cooke ed. 1961) (A. Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART").

A threat to the United States' relations with other countries can come from state courts no less than from other organs of state governments. This Court has implicitly recognized that fact in its act of state cases. "The act of state doctrine is grounded on judicial concern that *application of customary principles of law* . . . might frustrate the conduct of foreign relations by the political branches of the government." *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767-768 (1972) (opinion of Rehnquist, J.) (emphasis added); *see Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964). And the Court has not hesitated to find that state courts' application of state law created a potential threat to the federal government's conduct of foreign relations, even when the administration of the day discounted that concern. *See Zschernig* v. *Miller*, 389 U.S. 429, 434 (1968); *Sabbatino*, 376 U.S. at 432-433, 436.

When foreign nations such as *amici* treat with the United States on matters of consular notification or other issues, it is imperative that they have assurances that the United States will comply with its obligations. This compliance includes the individual States and thus requires that individual state procedural default rules—rules that are not even consistent across the country—will not prevent review of claims under the Vienna Convention. This Court therefore should confirm the rule announced more than two hundred years ago in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 236-237 (1796): "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way," for courts are under a "declared

duty . . . to determine any Constitution, or laws of any State, contrary to [a treaty] made under the authority of the United States, null and void."

2. State procedural default rules also are inconsistent with the very nature of the rights to consular notification and access. The basis of any claim under Article 36 is that the defendant was not notified of certain rights, as the Convention requires. The reason why the drafters of the Convention required detaining authorities to inform detained individuals of their rights to consular notification and access is that, in all likelihood, such individuals would not know that they had such rights.

It is not an answer to suggest that the defendant's lawyer could have raised any Vienna Convention claim on his behalf at or before trial, and that the lawyer's failure to do so is binding on the defendant. This argument is unpersuasive for at least three reasons.

First, one of the central purposes of the Vienna Convention right is to ensure that consular assistance can help the defendant secure culturally sensitive counsel. Lawyers who are not accustomed to representing foreign nationals may well not understand how the consulate could assist their clients.

Second, this argument assumes that the lawyer should have been aware of the right to contact the consulate under the Vienna Convention. But many lawyers may not be aware of the Vienna Convention's existence or of the possibility that consular assistance is available.

Third, the lawyer's failure to preserve a Vienna Convention claim should not constitute a default because Article 36 rights are personal to the individual. To be sure, the United States' legal system does generally recognize that "the lawyer has—and must have—full authority to manage the conduct of the trial." *See, e.g., Taylor* v. *Illinois*, 484 U.S. 400, 417-418 (1988). But the U.S. criminal justice system also recognizes exceptions to that rule; for example, a lawyer ordinarily may not waive "basic rights," *see id.*, such as the defendant's right to counsel or the right to trial by

jury. *See, e.g., Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988). In those circumstances, the defendant must be specifically and personally advised of his rights, and a "waiver" of those rights without a record that the defendant was made aware of them will not be deemed knowing and voluntary. *See, e.g., Taylor*, 484 U.S. at 418 (requiring "the fully informed and publicly acknowledged consent of the client").

The rights to consular notification and access are of similar dimension. Article 36 requires that notification of the right to consular access be made *to the detained individual*, not to the individual's agent or attorney. Whether to contact the consulate for assistance is a decision for the detained individual to make. Indeed, it would be particularly inappropriate to put the defendant's lawyer in control of that decision. As discussed above, one of the purposes of Article 36 is to ensure that the consulate can assist its detained nationals in finding counsel who apprehends the unique difficulties of representing someone who is not familiar with the U.S. criminal justice system and who can communicate with both the defendant and the consulate about possible lines of investigation.

Finally, Vienna Convention claims should not be subject to procedural default because in many cases it may be impossible to ascertain whether such a claim would be available until after trial. In this regard, Vienna Convention claims are analogous to claims of ineffective assistance of counsel, which, the Court has recognized, present an exception to the rule that claims not raised on direct review may not be raised on collateral review. *See Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). The Court concluded that "requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote the[] objectives" of conserving judicial resources and respecting final judgments. *Id.* at 504. "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this

purpose." *Id.* at 504-505. Absent factual development, "an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id* at 505.

The same logic applies to many claims of Vienna Convention violations. In cases where the individual was not made aware of his Vienna Convention rights until after the trial, the impact of the violation may not be apparent from the trial record. Indeed, in many Vienna Convention cases, the central issue will be what is *missing* from the trial record—what facts might have been developed, or what decisions might not have been made, had the consulate been able to intercede. A habeas court would be able to consider such additional facts relevant to assessing the prejudicial effects of the treaty violation. State procedural default rules thus have no place in the analysis of Vienna Convention claims.

E. *Breard* Should Not Be Followed In These Cases

Of the three principal questions presented in these cases—whether Article 36 creates individual rights, whether a suppression remedy is available for violations of those rights, and whether those rights are subject to state procedural default rules—only one, the procedural default issue, was addressed by this Court in its per curiam opinion accompanying the denial of certiorari in *Breard* v. *Greene*, 523 U.S. 371 (1998). *Breard* therefore presents no obstacle to a conclusion by this Court that Article 36 creates individual rights or that a suppression remedy may be available for a violation of those rights.[14]

As to the issue of procedural default, this Court should look past *Breard* because of a fundamental change in the legal landscape in the intervening years: the ICJ's ruling on Article 36. In *Breard*, the Court found it "unfortunate" that no "international court" possessing "jurisdiction to interpret" the Vienna Convention had rendered any relevant in-

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[14] In *Breard*, the Court assumed that Article 36 created individual rights. *See* 523 U.S. at 376 ("The Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest.").

terpretation. 523 U.S. at 375, 378. The Court recognized that if such a decision had been rendered, this Court "should give [it] respectful consideration." *Id.* at 375. In the absence of such prior interpretation, however, the Court noted the provision of the Vienna Convention declaring that the rights enforced by the treaty should be "exercised in conformity with the laws . . . of the receiving state," Vienna Convention, art. 36(2), 21 U.S.T. at 101, and held that this language indicated that state procedural default rules would still be applied. 523 U.S. at 375-376. In the present case, unlike in *Breard*, not only has the ICJ spoken, it has done so after two lengthy and thorough adjudications to which the United States was a party. The "respectful consideration," *id.* at 375, due to the ICJ's interpretation is now a compelling factor, and the *Breard* denial of certiorari should bear much less weight.[15]

Although reaching this conclusion may require departing from *Breard's* statements regarding procedural default, those statements should not be followed here. First, the Court's statement that "Breard procedurally defaulted his claim, if any, under the Vienna Convention," 523 U.S. at 375, was unnecessary to the Court's disposition of that case, since the Court *also* stated that Breard's failure to establish prejudice from any violation of the Vienna Convention was fatal to his claim, *id* at 377.[16] Second, the opinion in *Breard*

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[15] This Court has previously been willing to revise its interpretation of a treaty when additional information bearing on the proper interpretation was brought to its attention. *See United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833).

[16] Indeed, it is not clear that any aspect of *Breard* rests squarely on a ruling about procedural default. In *Breard*, after discussing procedural default generally, the Court stated that Breard was precluded from relief by a federal statute, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). *See Breard*, 523 U.S. at 376-377. This Court concluded that AEDPA "prevent[ed] Breard from establishing that the violation of his Vienna Convention rights prejudiced him," and that "Breard's ability to obtain relief based on violations of the Vienna Convention" was subject to AEDPA because AEDPA was a "subsequently enacted rule." *Id.* at 376. Bustillo's case, however,

accompanied a denial of certiorari, not a decision on the merits after full briefing and argument. While that opinion was more elaborate than the typical order denying certiorari or summarily affirming a lower court decision, the Court has made clear that it has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998). Third, the *Breard per curiam* opinion was rendered under especially exigent circumstances, *see Breard*, 523 U.S. at 379-380 (Stevens, J., dissenting), which further counsels against its precedential value.

F. The Importance Of The Right To Consular Notification Is Convincingly Demonstrated In These Cases

Each of these cases forcefully shows the value of consular notification and the potentially grave consequences when the requirement of notification is not observed.

1. Virginia's failure to notify Bustillo of his right to contact the Honduran consulate resulted in Bustillo's failure to obtain critical exculpatory evidence. The theory of the defense at trial was that another person, known as "Sirena") (now known to be Julio Osorto) a Honduran citizen like Bustillo, had in fact been the one to kill the victim by striking him with a baseball bat. The entire case came down to the testimony of five witnesses, three testifying that Bustillo was the killer and two saying that he was not (one of whom identified Sirena as the killer). A defense witness testified that Sirena had fled the U.S. for Honduras shortly after the crime. At the time of trial, the defense was unable to locate or properly identify Sirena.

Since the trial, with the help of the Honduran consulate, Sirena's name has been established, his flight to Honduras (including details specified by the defense witness) con-

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has been brought pursuant to Virginia's *habeas corpus* law, not AEDPA, and so the provisions of AEDPA that might otherwise preclude relief are inapplicable.

firmed, and a videotaped confession of Sirena admitting to striking the victim with a baseball bat has been obtained. Furthermore, police reports reflect that police stopped Sirena near the crime scene, that he falsely told police that he had not been at the crime scene, that Sirena had red stains on his clothes at the time, and that another witness saw Sirena cock a bat to strike the victim. The Honduran consulate has submitted a declaration stating that if it had been aware of Bustillo's case before trial—including the fact that the defense believed another Honduran national had committed the crime—it could have provided valuable assistance to Bustillo. Specifically, it could have supplied immigration records confirming Sirena's flight to Honduras, a photograph of Sirena, and it could have attempted to contact and interview Sirena about the events. Habeas Pet. Exs. 26, 26a, 26b. The ample prejudice to Bustillo that resulted from the Virginia authorities' failure to notify him of his right to contact the consulate is therefore plain: the Honduran consular officials could have obtained evidence that would have crucially bolstered the defense's theory of the case and drastically undercut the prosecution's tactic of mocking Bustillo's theory of the case.

2. The case of Sanchez-Llamas likewise offers a lesson in the importance of the protections offered under the Vienna Convention. Following his arrest and *Miranda* warnings, but absent notification of his rights under the Vienna Convention, Sanchez-Llamas made inculpatory statements to the police. Sanchez-Llamas's confession was then used to convict him.

American citizens are, of course, generally familiar with *Miranda* warnings and their consequences. Indeed, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). A foreign national, however, may well lack this familiarity both with the content of the *Miranda* warnings and their effects in practice; a foreign national also may not apprehend the role of appointed counsel or the fact that a

statement to the police outside the presence of a magistrate or public prosecutor may be admissible at trial. Absent consular notification, Sanchez-Llamas was denied the opportunity to receive consular assistance that could have helped him understand that in the U.S., confessions (regardless of their accuracy) are not necessarily the fastest way out of trouble, as they may be in some countries. Had Sanchez-Llamas been offered consular notification, secured such assistance, and better understood the legal system, he might not have provided a confession, the reliability of which is challenged here.

Each of these cases demonstrates the peril that foreign nationals may face when they encounter an unfamiliar criminal justice system, and each demonstrates why consular assistance is so important in such situations. Because of the authorities' failure to observe Article 36, Bustillo was never apprised of a means by which he could secure crucial exculpatory evidence, and Sanchez-Llamas made inculpatory statements that may well not be reliable. Were a U.S. citizen detained abroad to be placed in such a situation, the United States would have good cause to be troubled by the violation of its national's rights. The same is no less true when the rights of *amici*'s citizens are violated here.

CONCLUSION

The judgments of the Supreme Court of Oregon and the Supreme Court of Virginia in these cases should be reversed.

Respectfully submitted.

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